83-5432

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

TIMOTHY GEORGE BALDWIN,

Petitioner,

v.

ROSS MAGGIO, Warden
Louisiana State Penitentiary,
Angola,

and

WILLIAM J. GUSTE, JR.,
Attorney General of the
State of Louisiana,

Respondents.

APPLICATION FOR STAY OF EXECUTION
PENDING DETERMINATION OF
PETITION FOR WRIT OF CERTIORARI
FILED HEREWITH

Petitioner Timothy George Baldwin applies for a stay of his execution pending the Court's determination of his petition for writ of certiorari, filed herewith and annexed to this stay application. The relevant facts and reasons why a stay should be granted are set forth in the certiorari petition itself.

Respectfully submitted,

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COUNSEL OF RECORD FOR PETITIONER

AFFIDAVIT OF SERVICE

Helen Ginger Roberts, being duly sworn, states:

I have served a copy of the foregoing APPLICATION FOR A STAY OF EXECUTION upon the Honorable Johnny Parkerson, District Attorney of the Parish of Ouachita, by depositing a copy of same in the United States Mail, postage prepaid and properly addressed to Post Office Box 1652, Monroe, Louisiana 71201, on this 15 day of September, 1983.

Helen Ginger Roberts
HELEN GINGER ROBERTS

Sworn to before me
this 15 day of September, 1983

Notary Public

83-5432

No. ____ A-188

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner, a Louisiana prisoner under sentence of death, seeks certiorari on questions which are closely related to questions already pending on grants of certiorari in Strickland v. Washington (No. 82-1554) and Pulley v. Harris (No. 82-1095). It is unnecessary to argue that these questions are worthy of certiorari review, as the Court has already deemed them worthy of such review. The real questions presented by this petition are i) whether certiorari should be granted to review this case as a companion case to Strickland and Pulley, and ii) whether, in the alternative, this certiorari petition should be held pending resolution of Strickland and Pulley, and the case then remanded if necessary for reconsideration in light of the decisions in those cases.

The specific issues which petitioner presents in common with Strickland and Pulley are the following:

I. Whether, under the appropriate standard for finding that defense counsel's ineffective representation prejudiced petitioner -- a standard to be determined by this Court in Strickland -- the Court of Appeals should have required an evidentiary hearing rather than presuming on a cold record that under no circumstances could petitioner establish prejudice. Specifically:

A. Whether the Court of Appeals erred in assuming that defense counsel's failure to move for a new trial based upon discovery of a motel check-in receipt which corroborated petitioner's alibi defense could not have prejudiced petitioner. (The court made this assumption by speculating ways in which the receipt might be consistent with petitioner's guilt, even though that speculation was based upon credibility choices and factual findings which no jury and no state court has ever made in this case, and which none was ever asked to make because of defense counsel's incompetence.)

B. Whether the Court of Appeals erred in assuming that the testimony of 11 affiants whom defense counsel incompetently failed to call as witnesses in mitigation at the penalty phase could not have persuaded a single juror to vote for a life sentence. (The court made this assumption even though the district court had failed to conduct an evidentiary hearing, with the result that no tribunal has ever heard the testimony of these 11 affiants in person and assessed on that basis whether they might have persuaded at least one juror to vote against the death penalty. [The affidavits of these 11 individuals are annexed as Appendix G.])

II. Whether the Louisiana Supreme Court's policy of engaging in proportionality review of death sentences only on a district-wide rather than a statewide basis violated petitioner's rights under the Eighth and Fourteenth Amendments. (Louisiana's review procedure, which is unique in the United States, presents an issue inseparable from Pulley v. Harris, in which the Court will consider not only whether some form of proportionality review is constitutionally required in death cases but also, "[i]f so, what is the constitutionally required focus, scope, and procedural structure of such a review." [Certiorari petition of petitioner Pulley, question presented no.2.])

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Timothy George Baldwin respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 704 F.2d 1325 (5th Cir. 1983) and is attached as Appendix A. The order of the Court of Appeals denying rehearing is noted at 709 F.2d 712 (5th Cir. 1983) and is attached as Appendix B. The majority and dissenting opinions in the Court of Appeals with respect to a stay pending certiorari are not yet reported and are attached as Appendix C. The opinion of the district court is unreported and is attached as Appendix D.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The opinion of the Court of Appeals was rendered on May 16, 1983. The order of the Court of Appeals denying a timely petition for rehearing was rendered on June 23, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the assistance of counsel for his defense;

the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the statutes of Louisiana governing sentencing in capital cases, La. Code Crim. Pro. Articles 905-905.9, which are attached as Appendix E; and it involves Louisiana Supreme Court Rule 28, governing review of capital sentences, which is attached as Appendix F.

STATEMENT OF THE CASE

A. Course of Proceedings

On July 29, 1978, at a jury trial in the Fourth Judicial District Court, Monroe, Louisiana (Ouachita Parish), petitioner was convicted of first degree murder. On that same date, the

jury voted to sentence petitioner to death. On May 19, 1980, the Supreme Court of Louisiana affirmed the conviction and death sentence. State v. Baldwin, 388 So.2d 664. Certiorari was denied on January 12, 1981. 449 U.S. 1103.

On March 26, 1981, petitioner filed an application for post-conviction relief in the Fourth Judicial District Court of Ouachita Parish. On that same date the court denied relief, without a hearing, for lack of jurisdiction. The following day, March 27, 1981, the Supreme Court of Louisiana denied review of the state trial court's decision, without opinion. Federal habeas corpus relief was denied in the Western District of Louisiana, again without a hearing, on May 4, 1981. Baldwin v. Blackburn, 524 F.Supp. 332. On August 14, 1981, the Fifth Circuit affirmed. 653 F.2d 942. Certiorari was denied on April 26, 1982. 456 U.S. 950.

The Fourth Judicial District Court of Ouachita Parish then set an execution date for May 27, 1982. On May 17th petitioner filed an application for post-conviction relief in that court raising federal constitutional issues identical to those raised in this proceeding. The court summarily denied relief, without a hearing, the same day. The Supreme Court of Louisiana denied relief without opinion the following day. One day later, on May 19, 1982, the instant federal habeas corpus proceeding was commenced. The district court summarily denied a stay of execution and habeas corpus relief the next day, May 20th, and one day after that denied both a certificate of probable cause and a stay of execution pending appeal.

On May 24, 1982, the Court of Appeals granted a certificate of probable cause and a stay of execution. The appeal was subsequently placed on an expedited schedule, and it was argued on August 19, 1982 before a panel of Circuit Judges

Rubin and Johnson and Chief District Judge Parker (M.D. La). On September 14, 1982, the Court advised the parties that determination of the appeal would await the outcome of the pending en banc proceeding in Washington v. Strickland, 673 F.2d 879 (5th Cir. Unit B 1982), rehearing en banc granted, 679 F.2d 23 (5th Cir. Unit B 1982), argued en banc, June 15, 1982. Following the rendering of the en banc decision in Washington on December 23, 1982 (693 F.2d 1243), the parties filed supplemental briefs in January 1983. On May 16, 1983, the panel issued its opinion affirming the district court's summary denial of federal habeas corpus relief.[1/] Rehearing and rehearing en banc were denied without opinion on June 23, 1983.

The following day, June 24, 1983, petitioner filed an application for a stay of execution pending certiorari. The State's response was filed on July 1, 1983. Two months later, on September 1, 1983, the Court of Appeals denied the stay by a 2-1 vote. Judge Sam D. Johnson, author of the panel opinion affirming the denial of federal habeas corpus relief, dissented from the denial of the stay.

B. Statement of Facts

1. Ineffective Assistance of Counsel with Respect to Guilt

In the instant habeas corpus proceeding petitioner alleged that he was deprived of the effective assistance of counsel in the determination of his guilt of a capital offense because his lawyers failed to seek a new trial or other appropriate post-verdict relief when they belatedly obtained significant exculpatory evidence -- a motel check-in receipt --

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1/ The panel held that under the circumstances of this case consideration of the merits of petitioner's second habeas corpus proceeding was not barred by Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. Baldwin v. Maggio, 704 F.2d 1325, 1328 n.6 (5th Cir. 1983)(Appendix A).

that established petitioner's presence over 70 miles from the crime scene at or near the time of the murder. Petitioner argued that the trial testimony of Mrs. J.C. Hawkins, a prosecution witness, demonstrates the significance of this April 4, 1978 motel check-in receipt, because Mrs. Hawkins observed the perpetrator's van outside the victim's house at 11:10 P.M. on April 4th (R.1102)[2/], and petitioner could not have travelled the 70 miles from the scene of the crime to El Dorado, Arkansas in order to have checked in by midnight on that date.[3/] Petitioner further argued that trial counsel's failure to move for a new trial on the basis of the motel check-in receipt was especially shocking in light of other evidence developed at trial pointing to petitioner's innocence. For example, (i) one of the witnesses who had observed a male and female visitor to the deceased's home and had seen what appeared to be a beating in the deceased's home on the night of the murder viewed petitioner in a line-up and identified another person in the line-up as the male visitor he had seen (R. 1176); (ii) the initial police bulletins had described the killer as being in his twenties, whereas petitioner is in his forties (R. 1465-66); and (iii) the initial police bulletins had described the killer's vehicle as a brown Dodge van, and one neighbor had described its color as "goldish" (R. 1121, 1526), whereas petitioner was driving a black Ford van (R. 1201).

The district court summarily rejected this claim of ineffective assistance of counsel. On appeal the Fifth Circuit did not dispute the probative force of the receipt as showing

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2/ Numbers preceded by "R." refer to pages of the state trial court record.

3/ The testimony of several other prosecution witnesses, tracking petitioner's whereabouts on April 3rd and 4th in minute detail, makes it impossible for him to have checked into the motel in El Dorado prior to nightfall on April 4 -- the time when the murder was committed. R. 1224-25, 1259-61, 1353. See pp. 7-9, infra.

that petitioner in fact checked into the motel before midnight (704 F.2d at 1330 n.10), but pointed out that two other witnesses -- Paul Thomas Rice and Robert Grisham -- observed the van outside the house at about 10:25 PM or 10:30 PM and that "[w]e cannot say that ... Hawkins' testimony to the van's presence should necessarily be accepted over Rice and Grisham's ..." (id. at 1331). The Court of Appeals therefore assumed that defense cou nsel's failure to move for a new trial based upon discovery of the motel check-in receipt could not have prejudiced petitioner.

On rehearing, petitioner argued that the panel had misapprehended the record in taking this view of the relationship between the testimony of Rice and Grisham and that of Mrs. Hawkins. Rice testified that he left his apartment "[s]omewhere about ... maybe about 10:15" (R. 1143), and that his estimate of 8 minutes spent in a store a block from the apartment before he saw the perpetrator's van was based upon his offhand assessment of the amount of time it took for the store to service "two or three customers ahead of us" (R. 1164). When asked for the precise time spent in the store, he replied "I can't really recall, but it's not ... not over eight" (ibid). Grisham testified that he and Rice left Rice's apartment at "[a]bout 10:15, I think" (R. 1196); when asked how long they stayed in the store, he replied "Oh, about ten or fifteen (10 or 15) minutes, something like that, I ain't positive" (R. 1210); and Grisham also contradicted Rice's assertion that they had seen the van drive off ("No, we went on to the house") (R. 1212).

Thus, petitioner argued, Rice and Grisham were never sure of the exact time when they left for the store; they approximated -- differently -- the amount of time that they spent in the store; and they differed as to whether or not they had seen the van drive away. By contrast, Mrs. Hawkins was precise as to time, and quite sure of her testimony. When asked

on direct examination how long the van stayed parked outside the victim's house, she replied: "From 9:30 until ... ten minutes after eleven" (R. 1102). And when the prosecutor followed up by asking whether she was "really positive about the time" (ibid.), she responded:

> Yes sir ... because I went into my kitchen to turn my kitchen lights out at ten minutes after eleven and it [the van] was still sitting over there with the lights on.

(ibid.) Although Mrs. Hawkins did not say whether her certainty as to the precise time was based upon her looking at a clock in the kitchen, or upon a habit of always turning out the kitchen lights at that hour, or upon some other basis, one thing is clear: unlike Rice and Grisham, she was very, very sure of her testimony as to time.

Additionally, petitioner noted that Mrs. Hawkins' testimony was not impeached in any manner which might weaken her credibility before the jury. By contrast, Rice is the witness who, upon viewing petitioner in a line-up, identified another male in the line-up as the man he had seen outside the victim's house (R. 1176); and Grisham was apparently one of the persons responsible for the initial police bulletins describing the male perpetrator as being in his twenties, i.e., 20 years younger than petitioner (R. 1216, 1465-66).[4/]

Despite being apprised of these facts of record, the Court of Appeals denied rehearing without opinion.

* * *

As the Court of Appeals recognized, "[t]he record clearly discloses that Baldwin, after once arriving in West Monroe [on

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4/ "Q. [By defense counsel] Isn't it true, Mr. Grisham, that you told these officers that you thought you'd seen someone in their ... some people in their mid to late twenties?

A. I might have, I ain't positive ... it might have been, I ain't positive." (R. 1216)

April 4, 1978], did not leave the town until after he stopped at [the victim's] home" (704 F.2d at 1331-32).[5] However, the panel speculated alternatively that petitioner might perhaps have gone from Holmes County State Park in Mississippi to El Dorado, Arkansas on the morning of April 4th, checked into the motel at that time (thereby obtaining a receipt dated the 4th), and then proceeded to West Monroe, Louisiana (ibid.). On petition for rehearing petitioner pointed out that this second speculative possibility -- like the Fifth Circuit's conjecture regarding a never-made credibility choice among the three prosecution witnesses, Hawkins, Grisham and Rice -- was not supported by the record and did not establish the absence of prejudice.

According to the prosecution's testimony, petitioner arrived in West Monroe at about noon on April 4, 1978. (R. 1224). As the Fifth Circuit noted, the distance from Holmes County State Park to West Monroe is about 200 miles (id. at 1331 n. 13), i.e., about a 3-1/2 hour drive. A glance at any road map will reveal that to go to El Dorado first would add at least 1 to 1-1/2 hours to the trip, considering merely the added mileage and the absence of any interstate highway to facilitate speed,[6] and not counting any time spent during the stop in El Dorado itself. Thus, to arrive in West Monroe by noon, petitioner would have had to leave the Holmes County State Park no later than about 7:00 to 7:30 A.M. on the morning of the 4th.

5/ It was undisputed that petitioner had visited the home of the victim -- a life-long friend -- on the evening of April 4. The dispute at trial was whether he had departed before the murderer's arrival, or had stayed later than claimed and committed the murder.

6/ It appears that petitioner would have had to travel northwest on minor roads to Greenville, Mississippi, cross the Mississippi River there, and then proceed westward on U.S. 82 to El Dorado.

However, the State's testimony contains not the slightest hint that petitioner left the park that early. The park superintendant, while not observing his departure, did not notice him gone until after 10 A.M. (R. 1261). And William Odell Jones, the State's star witness, testified as follows:

> Q. [By defense counsel] ... [W]hat time of day did they depart?
>
> A. Do you mean when they first left?
>
> Q. Uh huh (yes).
>
> A. It was in the morning.
>
> Q. Morning? Do you remember what time that was?
>
> A. No, I don't.
>
> Q. Was it before noon?
>
> A. I'd say so.

(R. 1353). Jones' testimony, while not fixing a precise hour of departure, certainly implies anything but an extremely early hour such as 7:00 or 7:30 A.M.

Accordingly, petitioner's motion for rehearing advised the Court of Appeals that there was no basis in the record for its speculation that petitioner might have driven from Holmes State Park in Mississippi to El Dorado Arkansas on the morning of April 4, 1978, checked into the motel, and then driven on to West Monroe in time to arrive by noon. The only available evidence, from two State's witnesses, implied a mid-morning departure time from the park, which is totally at odds with such a theory. Nonetheless, the court denied rehearing without addressing these facts.

2. Ineffective Assistance of Counsel With Respect to Sentencing

Petitioner alleged in his habeas corpus petition that trial counsel had failed to prepare in an adequate manner for the sentencing proceedings. Specifically, counsel failed to conduct an investigation to develop evidence in mitigation of punishment, and consequently failed to present any disinterested

witnesses with knowledge of petitioner's character and disposition and of other extenuating circumstances. Petitioner submitted 11 affidavits below demonstrating that trial counsel had neglected to interview readily available witnesses in mitigation who would have provided sentencing information extremely favorable to him.

The entire sentencing proceeding in this case -- opening statements, testimony of three of petitioner's family members, closing arguments, and jury instructions -- consumed approximately 50 minutes (R. 18). At the sentencing hearing, those three family members (petitioner's wife, Rita, and his stepdaughters, Michelle and Doris) testified about their impressions of petitioner. (R. 1684-1694). But their testimony was obviously suspect for bias, and lacked the appearance of objectivity which the testimony of more detached witnesses would have had.

Trial counsel had not engaged in any pretrial preparation for the penalty phase, and accordingly was unaware of or unable to present numerous readily available witnesses who would have provided favorable testimony about petitioner at the sentencing phase of his trial. These witnesses, whose affidavits were attached as Exhibits 2-12 to the habeas corpus petition and are reproduced in Appendix G to this petition, include Father Walbert Galerna, the former parish priest in the Calhoun-Choudrant area of Louisiana (Exhibit 2); Jessie Riser, the former sheriff of Lincoln Parish (Exhibit 3); individuals whose houses petitioner worked on when he was a crew chief for an aluminum siding company (Exhibits 3 and 10); friends, neighbors and co-workers (Exhibits 4-9 and 11); and one close relative (Exhibit 12).

Even though these individuals knew Tim Baldwin in different places and at different times, their affidavits provide uniformly positive impressions of him. Tim Baldwin is described

as a hardworking and helpful individual; a faithful contributor to his church; a non-violent, peaceable and polite person who did not use drugs or drink to excess; a person who was unusually giving and helpful to others; and a talented person with a variety of valuable skills. In the words of all of these individuals, he was a person about whom they could say nothing negative.

Each of these affidavits asserts the affiant's belief that an act of murder was totally out of character for Tim Baldwin. Father Galerna, former priest at St. Francis of Assisi in Calhoun, Louisiana, states: "[T]he murder he allegedly committed is totally inconsistent with the Tim Baldwin I knew. I wouldn't think he would kill anyone." (Exhibit 2.) Jessie Riser, the former sheriff, avers: "I would have never imagined that he would have done something like a murder. It just doesn't seem like the same person I knew. We must be talking about a different person." (Exhibit 3.) Johnny Whatley asserts: "I was under shock and taken totally by surprise by the news of Tim's arrest and conviction for murder. He wasn't that kind of man. I don't believe he did it." (Exhibit 4.) Jimmy Terry states that he and his wife "were astounded when we heard the news of Tim's arrest and conviction for murder." (Exhibit 10.) Thus, even after petitioner has been convicted and sentenced for murder, those individuals who knew him express their initial shock about the charges (Exhibits 6 and 8) and their continuing lack of belief that he could have been involved in the crime (Exhibits 7;8;9;10;12). These people uniformly express the feeling that Tim Baldwin "just wasn't the kind of man who would ever hurt anybody" (Exhibit 5;11). All of the affiants state that they would have willingly testified on petitioner's behalf at the sentencing hearing, but that they were never contacted by anyone involved in his defense.

The district court summarily dismissed petitioner's claim of ineffective assistance of counsel at sentencing, without conducting an evidentiary hearing. On appeal, the Fifth Circuit conceded that petitioner's allegations did raise factual issues which would require an evidentiary hearing under appropriate Sixth Amendment standards defining the rudimentary obligations of a criminal defense attorney: i.e, did counsel wholly forego conscientious preparation as alleged,[7/] or did he make a reasonably informed tactical decision to present only family members in mitigation? Baldwin v. Maggio, supra, 704 F.2d at 1334. However, the panel held that it was unnecessary to resolve these factual issues because petitioner had not shown actual and substantial prejudice as required by Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), cert. granted, ___ U.S. ___, 51 U.S.L.W. 3871 (June 6, 1983):

> [The affiants'] testimony would have served only to corroborate the portrait of the man sketched by his wife and daughters. It would have been largely cumulative, and from sources whose relationships with Baldwin were, both in time and intensity, remote from his offense. ... We cannot conclude that this evidence was of such significance that its omission worked an actual, substantial prejudice to the course of Baldwin's defense. For this lack of prejudice, his claim must be denied.

Ibid.

In support of his petition for rehearing, petitioner contended that the Washington decision required an evidentiary hearing on the question of prejudice, citing the plurality opinion in that case (693 F.2d at 1259, 1263) and the views of

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7/ In the district court petitioner had submitted affidavits by his wife and one of his stepdaughters (both witnesses at the penalty trial), himself, and his counsel's client in a criminal trial immediately proceeding petitioner's, all attesting to counsel's lack of preparation and to specific admissions of counsel to this effect. See Appendix G, Exhibits 13-16.

two concurring judges (id. at 1279-80). He further noted that the impact his eleven affiants in mitigation might have had upon a jury could not be evaluated without hearing them in person and assessing their earnestness and the depth of feeling which they might have conveyed to the sentencing jurors. For if even one juror had been persuaded by such witnesses in this case that petitioner deserved to live, his life would have been spared. La. Code Crim. Pro. Articles 905.6 and 905.8 (see Appendix E). Petitioner argued that no reliable determination could be made, at least without an evidentiary hearing of the affiants, that their testimony was incapable of persuading a single juror that there was sufficient redeeming value in petitioner's life history to permit him to remain on this earth.

While petitioner's rehearing petition was pending, this Court granted certiorari in Washington v. Strickland. Nonetheless, on June 23, 1983, rehearing was denied without opinion.

3. Proportionality Review

Petitioner alleged in the district court that the Louisiana Supreme Court's policy of engaging in proportionality review of death sentences only on a judicial-district-wide basis rather than on a statewide basis[8/] violated his rights under the Eighth and Fourteenth Amendments. The district court rejected the claim. Before the due date for filing of his brief in the Court of Appeals, that Court rejected the identical claim in another Louisiana case, Williams v. Maggio, 679 F.2d 381, 394-95 (5th Cir. Unit A 1982) (en banc). Accordingly, petitioner conceded in his brief that the issue was foreclosed in the Fifth Circuit by Williams, and presented it solely to preserve it for review by this Court.

While petitioner's appeal was pending, this Court granted certiorari in Pulley v. Harris (No. 82-1095) to decide whether

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8/ See Louisiana Supreme Court Rule 28, Appendix F; State v. Prejean, 379 So.2d 240, 250 (La. 1980) (Dennis, J. dissenting from the denial of rehearing).

the Constitution requires "any specific form of 'proportionality review' by a court of statewide jurisdiction prior to the execution of a state death judgment" (certiorari petition, question presented no. 1), and "[i]f so, what is the constitutionally required focus, scope, and procedural structure of such a review" (id., question presented no. 2). The Court of Appeals rejected petitioner Baldwin's claim on the basis of Williams, but added the following:

> We note that the Supreme Court has recently granted a petition for certiorari presenting proportionality review issues similar to those raised by Baldwin in his petition for habeas corpus. Pulley v. Harris, 692 F.2d 1189 (9th Cir. 1982), cert. granted, ___ U.S. ___, 103 S.Ct. 1425, 75 L.Ed.2d __ (1983).

Baldwin v. Maggio, supra, 704 F.2d at 1327 n.1.

C. Basis of District Court Jurisdiction

The basis of the federal district court's jurisdiction over this case was 28 U.S.C. §§ 2241, 2254.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioner will not trespass upon the Court's time by arguing that the issues of (i) prejudice in cases of ineffective assistance of counsel and (ii) proportionality review are important issues which merit certiorari review. The Court has already granted certiorari to review those issues this coming Term in Strickland v. Washington (No. 82-1554) and Pulley v. Harris (No. 82-1095).

The real questions before the Court on this petition, and the accompanying application for stay of execution, are whether petitioner's case (i) is worthy of consideration on certiorari as a companion case to Strickland and Pulley, and (ii) in the alternative, is at least sufficiently related to Strickland and Pulley as to require that the case be held pending their resolution, and then remanded if necessary for reconsideration pursuant to them.

I

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER, UNDER THE APPROPRIATE STANDARD FOR FINDING THAT DEFENSE COUNSEL'S INEFFECTIVE REPRESENTATION PREJUDICED PETITIONER -- A STANDARD TO BE DETERMINED THIS TERM IN STRICKLAND v. WASHINGTON (No. 82-1554) -- THE COURT OF APPEALS SHOULD HAVE REQUIRED AN EVIDENTIARY HEARING RATHER THAN PRESUMING UPON A COLD RECORD THAT UNDER NO CIRCUMSTANCES COULD PETITIONER ESTABLISH PREJUDICE

A. The Court of Appeals Erred in Assuming that Defense Counsel's Failure to Move for a New Trial Based Upon Discovery of a Motel Check-In Receipt which Corroborated Petitioner's Alibi Defense Could Not Have Prejudiced Petitioner

We recognize that Strickland concerns a claim of ineffective assistance of counsel with respect to sentencing rather than guilt. However, this Court has only recently invalidated procedures which "diminish the reliability of the guilt determination" in a capital case, and thereby "enhance[] the risk of an unwarranted conviction." Beck v. Alabama, 447 U.S. 625, 638 (1980). We respectfully submit that a case such as petitioner's, involving a capital defendant who steadfastly maintains his innocence and has raised a viable claim of ineffective assistance with respect to the determination of guilt, would be an appropriate companion case to Strickland.

This would be an especially appropriate companion case to Strickland because the Court of Appeals found the absence of prejudice not on the basis of an evidentiary hearing -- indeed, petitioner has never received a hearing on his ineffective-assistance claims in any court, state or federal -- but rather solely on the basis of speculations spun from the state trial record made by counsel whose competence is in question. Without resolving the question of counsel's competence and without an evidentiary hearing, the court below predicated its finding

of an absence of prejudice upon credibility assessments (i.e., that prosecution witnesses Rice and Grisham might be credited over prosecution witness Hawkins) and at least one factual determination (i.e., that petitioner may have checked into the motel in El Dorado on the day of the crime before proceeding to West Monroe) which have never been considered -- let alone made -- by any trier of fact.

If the trial jury had made these credibility choices and resolved the pertinent factual issues in convicting petitioner, this would be a different case. If at least the trial judge who heard the testimony had made such credibility choices and resolved the factual issues upon consideration of a timely motion for a new trial based on the discovery of the motel check-in receipt, this would again be a different case. But the stark fact is that neither the jury nor the trial court ever made the credibility choices or factual findings on which the Court of Appeals based its conclusion that petitioner had suffered no prejudice from the ineffective assistance of counsel; nor were they given any occasion to do so. The reason: petitioner's trial attorneys, by failing to take appropriate action upon discovery of the motel check-in receipt, denied him effective assistance of counsel in presenting the evidence that made the question of his guilt or innocence turn upon those critical credibility choices and factual findings in the first place.

Thus, the Court of Appeals chose to excuse counsel's ineptitude by assuming unmade credibility choices and developing new factual theories for the first time on a federal habeas corpus appeal. It did this although, as a matter of Louisiana new-trial law, even the trial judge may not "weigh the new evidence as though he were a jury, determining what is true and what is false," and may not reject a motion for a new trial "based on less evidence and more speculation than the defendant's hypothesis." State v. Talbot, 408 So.2d 861, 885, 886

(La. 1981)(on application of rehearing). See also State v. Dimm, 95 So. 414 (La. 1923); State v. Glover, 73 So. 843, 845 (La. 1917). Surely as a matter of federal constitutional law, just as it violates the Constitution to convict a capital defendant "'upon a charge that was never made,'" Presnell v. Georgia, 439 U.S. 14, 17 (1978), quoting Cole v. Arkansas, 333 U.S. 196, 201 (1948), it violates both Due Process and the Eighth Amendment to execute a condemned inmate upon factual theories that involve credibility choices and findings of fact which were never made by any jury or any state trial court -- factual theories conceived for the first time by a federal appellate court speculating as to how the facts might have been found if a trier of fact had considered them.

This Court has repeatedly emphasized that reliable fact-finding is of the utmost importance in death penalty cases. Beck v. Alabama, supra. See also Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); id. at 118-19 (concurring opinion of Justice O'Connor); Green v. Georgia, 442 U.S. 95, 97 (1979); Lockett v. Ohio, 438 U.S. 586, 604 (1978)(plurality opinion); Gardner v. Florida, 430 U.S. 349, 359 (1977)(plurality opinion); id. at 363-64 (concurring opinion of Justice White); Woodson v. North Carolina, 428 U.S. 280, 305 (1976)(plurality opinion). The Court should grant certiorari in this case to consider under the standard for prejudice to be determined in Strickland v. Washington, supra, whether the Court of Appeals acted consistently with that principle when it found the absence of prejudice by assuming credibility choices and factual findings which no jury and no state court has ever made, and which none were asked to make because of counsel's incompetence.

B. The Court of Appeals Erred in Assuming, in the Absence of any Habeas Corpus Hearing, That the Testimony of 11 Affiants in Mitigation Whom Defense Counsel Incompetently Failed to Call as Witnesses at the Penalty Trial Counsel Not Have Persuaded a Single Juror to Vote for a Life Sentence

In Strickland v. Washington, the district court conducted an evidentiary hearing before determining that defense counsel's

incompetent representation at sentencing did not prejudice the defendant. No such hearing was held in this case. Thus the case presents a question which is an important corollary to the question in Strickland: under what circumstances may a federal habeas court decide without an evidentiary hearing that a death-sentenced petitioner's ineffective-assistance-of-counsel claim should be rejected for want of prejudice?

Petitioner here submitted with his habeas corpus petition the affidavits of 11 individuals whom defense counsel had incompetently failed to locate and call as witnesses in mitigation at the penalty trial. Since these sworn statements have already been summarized (see pp. 10-11, supra) and appear in Appendix G to this petition, we will not repeat their contents. It suffices to state that they are about as uniformly positive as one could imagine any segment of the citizenry being toward any individual who is not a close relative or a life-long friend.

It is difficult to conceive that the testimony of these 11 affiants can be written off as utterly lacking in potential impact on petitioner's penalty trial, especially when one considers that the only defense witnesses actually called at that trial were petitioner's dearest relatives. Yet the federal courts below have assumed, without even allowing a hearing at which the affiants could testify, that not one or all of these affiants together as live witnesses could have persuaded a single juror to vote for a life sentence.[9/] This is to say dogmatically that, no matter how persuasive or earnest or deeply motivated, none of the 11 affiants could have convinced even one member of the jury that petitioner deserved to live. We respectfully submit that whether federal courts should engage in such assumptions -- especially where they have already con-

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9/ Death sentences in Louisiana may be imposed only by a unanimous vote of the jury. If even one juror declines to vote for death, a life sentence must be fixed. La. Code Crim. Pro. Articles 905.6 and 905.8 (Appendix E).

ceded, as in this case, that the underlying claim of ineffectiveness has sufficient strength to merit a hearing (704 F.2d at 1334) -- is an issue manifestly worthy of review by this Court.

Certiorari should also be granted because a very recent decision of the Eleventh Circuit, King v. Strickland, ___ F.2d ___, No. 82-5306 (11th Cir. Sept. 2, 1983), is in direct conflict with the Fifth Circuit's resolution of this case. In King, as in this case, the defendant identified on habeas corpus several mitigation witnesses who should have been called at the penalty phase. Even though defense counsel had called one mitigation witness at the penalty phase, and had relied upon the positive character testimony of two additional witnesses who had testified at the guilt phase, the Eleventh Circuit held that the defendant had been prejudiced by counsel's ineffectiveness and reversed the district court's denial of federal habeas corpus relief. Slip op. at 18-22. A split between the two Circuits with the largest number of death-sentenced individuals as to the appropriate disposition of factually indistinguishable ineffective assistance claims clearly merits certiorari review.[10/]

10/ The Eleventh Circuit in King did not rely solely upon defense counsel's failure to present mitigating evidence, but also held that counsel was ineffective because he made a perfunctory closing argument at the penalty phase that "may have done more harm than good." Slip op. at 21. Petitioner alleged in his habeas corpus petition that defense counsel here made just such a summation. That summation, which took up less than two transcript pages, is best illustrated by the following excerpt:

> Some people think the purpose of capital punishment is to keep a terribly bad person from ever meeting society again, but then that can be done if he merely is in jail for the rest of his life.... I'm not going to tell you whether Mr. Baldwin will or will not be rehabilitated and ... in Angola State Penitentiary, but I am telling you this, the penitentiary should not be the last place for men, in other words, they should not merely wilt and die down there. If they go down there, they should acquire new habits, they should broaden their lifestyles, they should read magazines, they should be useful with their hands, they should do something to keep themselves occupied and enrich their surroundings, if not the world. Mr. Baldwin can be of help in that role.

R. 1696.

C. Conclusion

Whether or not this Court concludes that the issues set forth in subparts A and B, supra should be heard along with Strickland, it is obvious that this Court's decision in Strickland as to the appropriate standard of prejudice in ineffective-assistance cases will have implications for petitioner's contentions. As noted by the author of the opinion below, in his subsequent dissent from the denial of a stay pending certiorari, the Fifth Circuit's resolution of the issues in Strickland was "central to our decision." Appendix C, dissenting opinion of Judge Sam D. Johnson at 3 n.1.[11/] Indeed, the Fifth Circuit deliberately delayed deciding petitioner's case until it knew the outcome of its own resolution of the issues in Strickland. Ibid. With petitioner's life hanging in the balance, this Court should do no less. Accordingly, at the very minimum this petition should be held pending the Court's decision in Strickland this coming Term. If after oral argument and due deliberation the Court resolves Strickland in a manner which cannot conceivably be of help to petitioner, the denial of certiorari at that time would be appropriate as to petitioner's claims of ineffective assistance. If the Court resolves Strickland in a manner which is helpful to petitioner, the case should be remanded to the Court of Appeals for reconsideration in light of that decision.

II

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE LOUISIANA SUPREME COURT'S POLICY OF ENGAGING IN PROPORTIONALITY REVIEW OF DEATH SENTENCES ONLY ON A DISTRICT-WIDE RATHER THAN A STATEWIDE BASIS VIOLATED PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

In Pulley v. Harris (No. 82-1095) this Court granted certiorari to determine two questions presented by the petition

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11/ The opinion on the merits below cites Strickland on eight different occasions. 704 F.2d at 1330, 1332, 1333, 1334.

for review in that case: first, whether the Constitution requires "any specific form of 'proportionality review' by a court of statewide jurisdiction" in death cases, and secondly, "[i]f so, what is the constitutionally required focus, scope, and procedural structure of such a review."

In this case petitioner challenges the "focus, scope, and procedural structure" of Louisiana's system of proportionality review. That system is unique among the states which have enacted death penalty statutes. Although the Louisiana Supreme Court is a court of statewide jurisdiction, it has chosen to review the proportionality of each death sentence solely by comparing it with other first degree murder cases within the same judicial district -- not within the state as a whole. Since Louisiana has 40 separate districts (39 official judicial districts plus the Parish of New Orleans courts), this system leads to extremely fragmented proportionality review of death sentences. The death penalty in one case may be totally out of line with the sentence imposed upon similar defendants for similar crimes in 39 jurisdictions within the State, but as long as it is consistent with the sentences imposed in the 40th jurisdiction, it may be upheld on appeal.

In view of the Questions Presented in Pulley, it is hard to imagine the Court deciding that case without saying something about the minimal requirements for a constitutionally acceptable system of proportionality review in death cases. Such a statement would, of course, impact heavily upon this case. As the Court of Appeals has noted, the proportionality review issues in Pulley are "similar to those raised by Baldwin in his petition for habeas corpus." 704 F.2d at 1327 n.1.

The Court may deem it appropriate to grant certiorari and hear this case as a companion case to Pulley, in order to explore a broader range of issues relating to the nature and

scope of a State's obligation to review death cases on appeal. At the very minimum, given the substantial similarity between the proportionality review issues here and in Pulley, this case should be held until Pulley has been duly argued, deliberated and decided in accordance with the Court's procedures.

CONCLUSION

The writ of certiorari should be granted. Alternatively, this petition should be held for appropriate disposition in light of the Court's resolution of Strickland v. Washington and Pulley v. Harris.

Respectfully submitted,

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COUNSEL OF RECORD FOR PETITIONER

AFFIDAVIT OF SERVICE

Helen Ginger Roberts, being duly sworn, states:

I have served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI upon the Honorable Johnny Parkerson, District Attorney of the Parish of Ouachita, by depositing a copy of same in the United States Mail, postage prepaid and properly addressed to Post Office Box 1652, Monroe, Louisiana 71201, on this ___ day of September, 1983.

HELEN GINGER ROBERTS

Sworn to before me
this day of September, 1983

Notary Public

APPENDIX A

final agency action. *Id.* at 242, 101 S.Ct. at 494.

In summary, we hold that the Commissioner's decision on the abandonment issue is not a final agency action subject to immediate judicial review. The abandonment issue can properly be considered anew in the interference proceeding. *See Klein, supra.* The Commissioner's decision did not definitively decide the abandonment issue, and the patent dispute between Xerox and Kodak has yet to be resolved. Immediate review would serve neither efficiency nor enforcement of the Patent Act, but would tend to interfere with the proper functioning of the agency and to burden the courts. Finally, judicial intervention at this time would lead to piecemeal review which at least is inefficient, and may be unnecessary depending on the outcome of the interference proceedings. *See FTC v. Standard Oil Co. of Calif.*, 449 U.S. at 242, 244 n. 11, 101 S.Ct. at 494, 495 n. 11; *Bally Mfg. Corp. v. Diamond*, 629 F.2d 955, 960 (4th Cir.1980); *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 619 (9th Cir.1978).

AFFIRMED.

KEY NUMBER SYSTEM

Timothy George BALDWIN,
Petitioner-Appellant,

v.

Ross MAGGIO, Jr., Warden, Louisiana State Penitentiary, and William J. Guste, Jr., Attorney General of the State of Louisiana, Respondents-Appellees.

No. 83-3318.

United States Court of Appeals,
Fifth Circuit.

May 16, 1983.

Petitioner filed petition for writ of habeas corpus. The United States District Court for the Western District of Louisiana, Nauman S. Scott, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) petitioner was not denied effective assistance of counsel as a result of attorneys' decision not to move for a new trial on the basis of a motel receipt which corroborated his alibi testimony, since the motel receipt was not such evidence that ought to have produced a different result, and (2) petitioner was not deprived of effective assistance of counsel as the result of counsel's alleged failure to conduct a substantial, independent investigation in preparation for sentencing phase of trial, in absence of showing of actual and substantial prejudice occurring from attorneys' course.

Affirmed.

1. Habeas Corpus ⇐90

Whether evidentiary hearing is necessary to resolution of a charge of inadequate representation of counsel turns on an assessment of the record: if petition's allegations cannot be resolved absent examination of evidence beyond the record, a hearing is required; if matters relevant to claim of inadequate representation are spread fully on the record, further inquiry is unnecessary.

2. Constitutional Law ⇐268.1(6)

The Sixth Amendment, applicable to the States through the Fourteenth Amendment, entitles criminal defendant to counsel reasonably likely to render and rendering reasonably effective assistance. U.S.C.A. Const.Amends. 6, 14.

3. Criminal Law ⇐641.13(1)

To establish a constitutional violation based on ineffective assistance of counsel, petitioner must demonstrate both an identifiable instance of seriously inadequate performance by counsel and some actual, substantial disadvantage to the course of his defense resulting from that lapse; the inquiries are conceptually distinct, and petitioner's failure to sustain either will result in a denial of habeas corpus relief. U.S.C.A. Const.Amends. 6, 14.

4. Criminal Law ⇐641.13(7)

Petitioner was not denied effective assistance of counsel as a result of attorneys' decision not to move for a new trial on the basis of a motel receipt which corroborated his alibi testimony, since the motel receipt was not such evidence that ought to have produced a different result.

5. Criminal Law ⇐641.13(1, 7)

The constitutional norms by which effectiveness of a criminal representation is measured extend equally to the guilt and sentencing phases of capital trials. U.S.C.A. Const.Amends. 6, 14.

6. Criminal Law ⇐641.13(1)

Essential to the rendition of constitutionally adequate assistance in either the guilt or sentencing phase is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived. U.S.C.A. Const.Amends. 6, 14.

7. Criminal Law ⇐641.13(7)

Counsel's obligation to investigate, in the context of a capital sentencing proceeding, requires counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in mitigation of punishment, and ground the strategic selection among those potential defenses on an informed, professional evaluation of their relative prospects for success. U.S.C.A. Const.Amends. 6, 14.

8. Criminal Law ⇐641.13(7)

Satisfactory acquittal of counsel's responsibilities in the context of a capital sentencing proceeding normally will be predicated upon an independent search for witnesses, with knowledge of defendant's character, disposition to commit crimes and extenuating circumstances; beyond that, the extent of the investigation which will be considered reasonable cannot be exactly defined. U.S.C.A. Const.Amends. 6, 14.

9. Habeas Corpus ⇐85.2(2), 85.5(11)

Petitioner who seeks resentencing through allegations of a failure in trial attorney's investigation of, and preparation for, his sentencing hearing may not rest on proof only of the failure alleged and its constitutional dimension; he also shoulders the burden of proving that counsel's ineffectiveness resulted in an actual and substantial disadvantage to the course of his defense, and a failure to prove that he was prejudiced resulted in denial of the writ. U.S.C.A. Const.Amends. 6, 14.

10. Criminal Law ⇐641.13(7)

Petitioner was not deprived of effective assistance of counsel as the result of counsel's alleged failure to conduct a substantial, independent investigation in preparation for sentencing phase of trial, in absence of showing of actual and substantial prejudice occurring from attorney's course. U.S.C.A. Const.Amends. 6, 14.

Gravel, Robertson & Brady, Helen G. Roberts, Alexandria, La., for petitioner-appellant.

Bruce G. Whittaker, Asst. Dist. Atty., Monroe, La., for respondents-appellees.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN and JOHNSON, Circuit Judges, and PARKER,* District Judge.

JOHNSON, Circuit Judge:

Timothy George Baldwin is sentenced to die for the murder of Mary James Peters. A panel of this Court stayed his execution to consider his claims of ineffective assistance of counsel at the guilt and sentencing phases of his trial.[1] The performance of his attorneys in the guilt phase was not consti-

* John V. Parker, Chief Judge of the Middle District of Louisiana, sitting by designation.

1. Baldwin presented a third claim in his petition for habeas corpus: he argued that the Louisiana Supreme Court's practice of conducting its proportionality reviews of sentences meted out in capital murder cases on a district-by-district basis fails to satisfy the eighth and fourteenth amendments to the United States Constitution. Baldwin concedes that this panel's consideration of that claim is foreclosed by the en banc Court's rejection of an identical claim in *Williams v. Maggio*, 679 F.2d 381,

tutionally deficient; the alleged deficiencies in their investigation into considerations in mitigation of sentence have not been shown to have caused actual, substantial prejudice to the petitioner's defense. Baldwin's request for habeas corpus is denied.

I.

On the evening of April 4, 1978, eighty-five year old Mary James Peters was savagely beaten and left to die in the kitchen of her home in West Monroe, Louisiana. The instruments of death were the articles of everyday life: a telephone, a television, a kitchen stool and a cast iron skillet, all shattered into pieces by the force of the assault. She was found the next day, semi-comatose and incoherent, on the floor surrounded by the debris of the attack; she died on April 6 of massive cerebral hemorrhage and swelling, secondary to external head injuries.

Timothy Baldwin stood trial for her death.[1] The jury convicted him of murder in the first degree,[2] and recommended death on finding that the murder was committed in an especially heinous, atrocious and cruel manner during the perpetration of an armed robbery.[3] He was sentenced to die by electrocution. Baldwin's exhaustive appeal to the Louisiana Supreme Court was rejected, *State v. Baldwin*, 388 So.2d 664 (La.1980), and denied certiorari, *Baldwin v. Louisiana*, 449 U.S. 1103, 101 S.Ct. 901, 66 L.Ed.2d 830 (1981). Baldwin then mounted his initial collateral attack on his conviction. Sixteen claims were advanced; among them was an allegation that his trial counsel were ineffective because they failed to move for a new trial after acquiring a motel receipt corroborating Baldwin's alibi testimony.[4] Baldwin's application for post-conviction relief was denied by the state

394–95 (5th Cir.) (*en banc*) *cert. granted* (U.S. Dec. 10, 1982) (No. 82–5868).

We note that the Supreme Court has recently granted a petition for certiorari presenting proportionality review issues similar to those raised by Baldwin in his petition for habeas corpus. *Pulley v. Harris*, 692 F.2d 1189 (9th Cir.1982), *cert. granted*, —— U.S. ——, 103 S.Ct. 1425, 75 L.Ed.2d —— (1983).

2. Baldwin was convicted under La.Rev.Stat. Ann. § 14:30 (West), which provides, in pertinent part,

First degree murder is the killing of human being: (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

3. Louisiana allows a sentence of death to be imposed if "the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed." La.Code Crim.Pro.Ann. art. 905.3 (West). The recommendation must be unanimous. La.Code Crim.Pro.Ann. art. 905.6 (West).

Aggravating circumstances are defined by La.Code Crim.Pro.Ann. art. 905.4 (West), which provides, in pertinent part, that

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner.

Mitigating circumstances, under La.Code Crim.Pro.Ann. art. 905.5 (West), include

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(h) Any other relevant mitigating circumstances.

4. The petition also included an allegation that the Louisiana Supreme Court conducted its proportionality review of Baldwin's death sentence in a constitutionally impermissible manner. *See Baldwin II*, 653 F.2d at 953–54; *ante* n. 1.

trial court for want of jurisdiction. The Louisiana Supreme Court declined review of the state trial court's decision. Proceedings in federal court on his petition for habeas corpus yielded consideration of the merits of his claims; all were, nonetheless, rejected. *Baldwin v. Blackburn*, 524 F.Supp. 332 (W.D.La.), *aff'd* 653 F.2d 942 (5th Cir.1981), *cert. denied*, 456 U.S. 950, 102 S.Ct. 2021, 72 L.Ed.2d 475, *reh. denied* —— U.S. ——, 102 S.Ct. 2918, 73 L.Ed.2d 1323 (1982) (hereinafter *Baldwin II*).

The Louisiana trial court then ordered Baldwin to be electrocuted on May 27, 1982. Ten days before his sentence was to be carried out, Baldwin initiated the present proceedings for post-conviction relief. His petition was denied by the state trial court on the day it was filed, and by the Louisiana Supreme Court the following day. One day later he presented identical claims to the federal district court.[5] The district court denied his petition for habeas corpus relief without a hearing, and declined to stay his execution. Three days before the appointed date of execution this Court granted a stay pending appeal.

II.

Baldwin asks reconsideration of our earlier ruling that his trial counsel's failure to move for a new trial upon acquisition of an alibi-corroborating motel receipt did not constitute ineffective assistance of counsel, *see Baldwin II*, 653 F.2d at 947.[6] In this presentation of the claim, he argues that the motel receipt, viewed in the context of the entire trial record, conclusively demonstrates that he was seventy miles away from West Monroe at the time Mrs. Peters was fatally beaten. He asks that a writ of habeas corpus issue immediately, on the ground that the record as it is presently constituted indisputably discloses his innocence, and, perforce, inept representation by trial counsel; failing that, he asks for an evidentiary hearing exploring his former attorneys' decision not to move for a new trial. We shall first take up the latter claim.

A.

[1] Whether an evidentiary hearing is necessary to resolution of a charge of inadequate representation turns on an assessment of the record: If the petition's allegations cannot be resolved absent examination of evidence beyond the record, a hearing is required, *Clark v. Blackburn*, 619 F.2d 431, 432 (5th Cir.1980); if the matters relevant

proceeding was constitutionally inadequate. The State has not, however, suggested that this second petition should be barred as abusive. Neither did the district court consider the issue in its rejection of the petition. *Baldwin v. Maggio*, Civ.No. 82-1249 (W.D.La. May 20, 1982).

We find it unnecessary to comment either on the application of the doctrine to the circumstances of this proceeding, compare *Potts v. Zant*, 638 F.2d 727, 737 n. 14, *quoting Hardwick v. Doolittle*, 558 F.2d 292, 296 (5th Cir. 1977), *cert. denied* 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978), or on the merits of Baldwin's responsive allegations, *but cf. Wainwright v. Torna*, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982). Unless abuse is clearly shown on the record, a dismissal under Rule 9(b) may be entered only after an evidentiary hearing on the issue of abuse. *Potts* at 747–48. The record does not clearly disclose that Baldwin has abused the writ. At this point in the litigation, and in the absence of an objection by the state, we see little sense in a redirection of judicial resources.

5. Baldwin has exhausted state remedies on the three claims presented to the federal district court, *i.e.*, that his trial counsel was ineffective insofar as counsel failed to move for a new trial on the basis of the motel receipt, that his trial counsel inadequately prepared for presentation of, and presented, evidence in mitigation of punishment at the sentencing hearing, and that the Louisiana Supreme Court's proportionality review procedures are unconstitutional. *Daniels v. Maggio*, 669 F.2d 1075, 1076 (5th Cir. 1982); *Preston v. Blackburn*, 638 F.2d 788 (5th Cir.1981).

6. In anticipation of the possibility that this successive petition might be opposed or dismissed as an abuse of the writ, *see* Rule 9(b), Rules Governing Section 2254 cases in the United States District Courts, 28 U.S.C. foll. § 2254; *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); *Papiskar v. Estelle*, 612 F.2d 1003 (5th Cir.), *cert. denied*, 449 U.S. 885, 101 S.Ct. 238, 66 L.Ed.2d 111 (1980), Baldwin argued to the district court and to this Court that the assistance afforded by the counsel representing him in his prior habeas corpus

to a claim of inadequate representation are "spread fully on the record," *United States v. Curry*, 663 F.2d 572, 573–74 (5th Cir. 1981), further inquiry is unnecessary, *id.*

This claim may be resolved without recourse to a hearing. Baldwin's challenge is limited to the reasonableness of his trial counsel's decision to forgo a motion for new trial in view of what he argues is the "inescapable conclusion" of his innocence apparent on a simple comparison of the motel receipt with trial testimony establishing the time of the murderer's departure from Mrs. Peters' home.[7] All of the information that was relevant to Baldwin's trial attorneys' assessment of the motel receipt as a foundation for a motion for new trial is now before us. The record in support of the present petition includes a complete transcript of the trial testimony and a copy of the motel receipt; Baldwin's present counsel has ably directed our attention to the portions of the record bearing directly on his claim. Further debate on the significance of various passages in the trial record would neither aid nor enhance our evaluation. We turn to consideration of Baldwin's allegation of ineffective post-trial representation.

B.

[2] The sixth amendment, applicable to the states through the fourteenth amendment, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), entitles a criminal defendant to counsel reasonably likely to render and rendering reasonably effective assistance. *Baldwin II* at 946. The standard by which this court evaluates claims of ineffective assistance of counsel is clearly defined.

> Constitutionally effective assistance of counsel is "not errorless counsel, and not counsel judged ineffective by hindsight, ..." *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir.1974). The determination of whether a counsel rendered reasonably effective assistance turns in each case on the totality of facts in the entire record. *See Washington v. Estelle*, 648 F.2d 276 (5th Cir.), *cert. denied*, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); *United States v. Gray*, 565 F.2d 881 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978). Thus, we must consider a counsel's performance in light of "the number, nature, and seriousness of the charges . . . the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses." *Washington v. Watkins*, 655 F.2d 1346, 1357 (5th Cir.1981), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d [474] (1982). In this context, we recently recognized that while attorneys are not held to a higher standard in capital cases, the severity of the charge is part of the " 'totality of circumstances in the entire record' that must be considered in the effective assistance calculus." *Id.* *Gray v. Lucas*, 677 F.2d 1086, 1092 (5th Cir.1982).

[3] To establish a constitutional violation under this standard, a petitioner must

7. Baldwin's petition for habeas corpus relief did not allege that his trial counsel's performance was constitutionally inadequate because they failed to search for additional evidence buttressing the alibi suggested by the motel receipt. Rather, his petition, and his presentation in this Court, charged ineffective representation solely on the ground that his trial attorneys failed to act on new evidence which, viewed in the light of the trial record, conclusively demonstrates that Baldwin could not have been at the scene of the crime, at the time of the crime. The adequacy of trial counsel's investigation into the importance of the receipt was mentioned but once, and that only in passing, in Baldwin's appellate brief; no factual allegations were made in amplification of the charge. That one bare suggestion is wholly inadequate to raise a substantial claim of constitutional dimension, *Baldwin II* at 947; *United States v. Gray*, 565 F.2d 881, 887 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978); *Rutledge v. Wainwright*, 625 F.2d 1200, 1205 (5th Cir.1980), *cert. denied* 450 U.S. 1033, 101 S.Ct. 1746, 68 L.Ed.2d 229 (1981). Even if this cursory allusion sufficed to state a claim cognizable in habeas corpus, it could not at this time be adjudicated: this Court cannot consider unexhausted charges raised for the first time on appeal. *Spivey v. Zant*, 661 F.2d 464, 477 (5th Cir.1981); *Messelt v. Alabama*, 595 F.2d 247, 250 (5th Cir.1979); *compare United States v. Curry*, 663 F.2d 572, 573 (5th Cir.1981).

demonstrate both an identifiable instance of seriously inadequate performance by counsel, and some actual, substantial disadvantage to the course of his defense resulting from that lapse. *Washington v. Strickland*, 693 F.2d 1243, 1258, 1262 (5th Cir. 1982) (Unit B, *en banc*); *Boyd v. Estelle*, 661 F.2d 388, 389–90 (5th Cir.1981); *Washington v. Watkins*, 655 F.2d 1346, 1359 n. 23, 1360 (5th Cir.1981). The inquiries are conceptually distinct, *Washington* at 1359 n. 23; the petitioner's failure to sustain either will result in a denial of the writ. *Boyd* at 389.

[4] Evaluation of Baldwin's claim of ineffective representation in his attorneys' decision not to move for a new trial on the basis of the motel receipt must begin with an appreciation of the standard against which motions for new trials are measured in Louisiana courts. La.Code Crim.Pro. art. 851 (West) provides that

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> . . . .
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;[8]

Art. 851(3) consistently has been interpreted to demand that the defendant must show "not simply whether another jury *might* bring in a different verdict, but whether the new evidence is so material that it *ought* to produce a different result from the verdict reached." *State v. Molinario*, 400 So.2d 596, 599 (La.1981) (initial emphasis in the original; second emphasis added); *State v. Motton*, 395 So.2d 1337, 1350 (La. 1981); *State v. Rico*, 390 So.2d 1270, 1271 (La.1980).[9] Baldwin contends that the new evidence he offers would, in light of trial testimony to his movements on the day of the assault and to the time of the murderer's departure from Mrs. Peters' residence, wholly exculpate him. On careful examination of the trial record, we are constrained to disagree.

The information provided by the receipt is limited. While it indicates that Baldwin checked into the White Sands Motel in El Dorado, Arkansas on April 4, 1978, it does not specify the time at which he checked in.[10] Baldwin's argument, therefore, depends on a construction of the trial record both to establish that the murderer left Mrs. Peters' home too late to arrive in El Dorado before midnight on April 4, and to eliminate the possibility that Baldwin checked into the White Sands prior to arriving at Mrs. Peters' residence. Neither proposition is supported by a fair reading of the record.

Trial testimony linked the murderer, and Baldwin, with a dark-colored van. Half a dozen witnesses stated that a van was parked in front of Mrs. Peters' home for

8. Baldwin's counsel acquired the receipt approximately five months after the close of trial. The State concedes for the sake of argument that the motel receipt is material evidence which could not have been discovered prior to the close of trial even in the exercise of due diligence.

9. The revising committee's note to art. 851 emphasizes that the section was phrased deliberately to "stress[ ] the basic requirement that the irregularities complained of in a motion for a new trial must have resulted in the doing of an injustice to the accused." La.Code Crim. Pro. art. 851, official revision comment. This limitation of new trials to situations in which a convincing showing of injustice has been made is firmly established in Louisiana jurisprudence, *see id.*, *citing* Acts 1928, No. 2, § 1, arts. 506, 508, 509 (repealed 1967); *State v. West*, 172 La. 344, 134 So. 243 (La.1931).

10. We assume the accuracy of the receipt for the purposes of this discussion. It is, of course, possible that the receipt was misdated, perhaps 'accidentally,' because the person checked in shortly after midnight on April 4, 1978, and the room clerk had failed to change the date stamp promptly at midnight.

several hours on the night of the fourth. Two of those witnesses, Paul Thomas Rice and Robert Grisham, testified that they first noticed the van when they walked past Mrs. Peters' house at about 10:15 p.m. As they passed, Rice heard scuffling. He paused, then called Grisham back. Both men approached the house and looked into the lighted kitchen through an open window. As they watched, a man swung his arm, bending with the downswing as if striking a target on the floor. Circling and jumping as if to stay on target, the man struck repeatedly. Rice and Grisham decided they were seeing an interspousal quarrel, and resumed their walk to a nearby convenience store. Eight to fifteen minutes later, they returned.[11] Both noticed a man and woman standing in Mrs. Peters' yard near the van; the woman appeared to have something in her hand. Rice testified that he heard the man call "We'll see you later, Mrs. Peters", then watched them get into the van and head north. Grisham also testified that he saw them get into the van, but that he then turned his back and did not see the van pull away. Rice's and Grisham's testimony puts the assailant's departure at about 10:25 p.m. to 10:30 p.m. Their testimony was contradicted only as to the time of the van's departure by the recollection of another neighbor, Mrs. J.C. Hawkins. Hawkins stated that she noticed the van from the kitchen window of her home "catercorner" from Mrs. Peters' home and that she saw the van there at 11:10 p.m.

Baldwin admitted at trial that he was driving a dark van on April 4 and that he took his girlfriend with him on a visit to Mrs. Peters' home that night.[12] The van was seized by the police when Baldwin was picked up several days later in El Dorado. Subsequent search of the van by West Monroe police turned up a bank bag containing savings bonds and certificates of deposits in Mrs. Peters' name.

El Dorado, Arkansas, is approximately seventy miles north of West Monroe, Louisiana. Baldwin, relying exclusively on Hawkins' recollection that she saw the van outside Mrs. Peters' home at 11:10 p.m., argues that he could not have left West Monroe after 11:00 p.m. and arrived in El Dorado before midnight. He offers proof of his presence in El Dorado as irrefutable evidence of the truth of his claim that he left Mrs. Peters before the attack occurred. Baldwin does not argue that his arrival in El Dorado before midnight is inconsistent with Rice's and Grisham's testimony of the assailant's departure from Mrs. Peters' home at 10:30 p.m. We cannot say that it is, or that Hawkins' testimony to the van's presence should necessarily be accepted over Rice's and Grisham's testimony to the assailant's movements.

Even less certain conclusions can be drawn from the record as to Baldwin's whereabouts on April 4 prior to his visit to Mrs. Peters' home. Baldwin testified that he and his girlfriend, travelling together in the van, started out about noon from a park located about 50 miles north of Jackson, Mississippi, and arrived in West Monroe about 2:00 p.m.[13] The park superintendent testified that he noticed around 10:00 a.m. that Baldwin, the woman and the van were gone. Michelle Baldwin, the petitioner's stepdaughter, testified that she met him in West Monroe at about noon on the fourth. The record clearly discloses that Baldwin,

11. Rice and Grisham's testimony diverged somewhat on this point. Rice estimated the time elapsed as eight minutes; Grisham under direct examination stated that their return was about 15 minutes later. When confronted with Rice's statement on cross-examination, Grisham stated that he could not remember precisely, but would estimate that they were gone about 10 to 15 minutes.

12. Mrs. Peters was a longstanding friend of the Baldwin family. Timothy Baldwin met her in 1973, after she had already developed a close friendship with his wife Rita. Mrs. Peters visited the Baldwin's home on occasional Sundays, Christmas and Easter; she was godmother to one of their twin boys, and remembered the boys' birthday with gifts of savings bonds. Timothy Baldwin frequently did handyman work for Mrs. Peters around the house.

13. Baldwin's recollection of this trip must be erroneous in some aspect: the park is about 200 miles from West Monroe.

after once arriving West Monroe, did not leave the town until after he stopped at Mrs. Peters' home. But a large, indeterminate amount of the day elapsed before Baldwin got to West Monroe. The record does not address, much less substantiate, the contention that Baldwin did not stop in El Dorado on his way to West Monroe.

Finally, Baldwin's conviction was supported by more than this circumstantial evidence. Michelle Baldwin testified that on the afternoon of the fourth, before his visit to Mrs. Peters, her father told her he was facing "Old Smokey." When she said that she didn't understand, he told her that he meant the electric chair. Michelle spoke again with Baldwin on April 7. By then, she was aware of Mrs. Peters' beating and death; believing it was to the intended assault on Mrs. Peters that her father had referred in his mention of "Old Smokey", she asked why he did it. She stated that Baldwin answered only, "She didn't suffer, it was fast." William Odell Jones, a friend and travelling companion of Baldwin, Baldwin's girlfriend and her children,[14] testified that before going to West Monroe, Baldwin told him that Mrs. Peters had money and that if he had to kill her to get it, he would kill her. Jones further testified that on the day after the assault Baldwin admitted to him that he had killed Mrs. Peters by striking her with his hand, a telephone, a frying pan, a television and a mixer, and had stolen her valuables.

On the record before us we cannot conclude that the motel receipt, if presented on a motion for new trial, would have exculpated Baldwin. It is not inconsistent with conclusions that he was at Mrs. Peters' home at the time of the assault, and was the assailant. It is not such evidence that, as required by the standard controlling the granting of a new trial in Louisiana courts, ought to have produced a different result. Baldwin was not prejudiced by his trial attorneys' decision not to pursue a motion for new trial on the strength of the receipt. His request for habeas corpus relief on this ground must be denied.

III.

Baldwin's second argument in support of his habeas corpus petition charges his trial counsel with incompetency in their preparation for the sentencing phase of his trial. He claims that they failed utterly to conduct a substantial, independent investigation into the one line of defense on which they stake their attempt to stave off the death penalty; he has supported his claim with affidavits attesting to his counsels' inattention to matters in mitigation of punishment, and to the substance of the evidence which he claims they would have found available if only they had looked. He asks for a new sentencing hearing, or, at the least, an evidentiary hearing on his allegations of inadequacy.

[5-8] The constitutional norms by which effectiveness of criminal representation is measured extend equally to the guilt and sentencing phases of capital trials. *Washington v. Strickland*, 693 F.2d at 1250-58; *Williams v. Maggio*, 679 F.2d 381, 392 (5th Cir.1982) (Unit A *en banc*); *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir.1979) *(dictum), vacated as moot*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); *United States v. Pinkney*, 551 F.2d 1241, 1246 (D.C. Cir.1976). Essential to the rendition of constitutionally adequate assistance in either phase is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived. *Washington v. Strickland*, 693 F.2d at 1250-52; *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir.1979); *Davis v. Alabama*, 596 F.2d at 1217. That obligation to investigate, in the context of a capital sentencing proceeding, requires defense counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in mitigation of punishment, and to ground the strategic selection among those potential defenses on

14. The group wandered from Louisiana to Ohio to Florida and back. Their travels are chronicled in part in *Baldwin II*. *Id.* at 945.

an informed, professional evaluation of their relative prospects for success. *Washington v. Strickland*, 693 F.2d at 1250–58; *Brooks v. Estelle*, 697 F.2d 586, 589 (5th Cir.1982); *Gray v. Lucas*, 677 F.2d 1086, 1093–94 (5th Cir.1982). Satisfactory acquittal of these responsibilities normally will be predicated on an independent search for witnesses with knowledge of the defendant's character, disposition to commit crimes and extenuating circumstances; beyond that, the extent of the investigation which will be considered "reasonable" cannot be exactly defined. Our cases make clear the far limits of the Constitution's mandate: while "counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers," *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir.1980), neither is effective assistance given by a decision, tantamount to an abdication of the defendant's cause, not to investigate potential defenses at all. *Washington v. Strickland*, 693 F.2d at 1252, 1257; *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir.1981); *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir.1978). Between those extremes, a determination of whether an investigation is reasonably adequate properly and necessarily "depend[s] upon a variety of factors, including the number of issues in the case, the relative complexity of those issues, the strength of the Government's case, and the overall strategy of trial counsel," *Washington v. Strickland*, 693 F.2d at 1251.

[9] But the matter does not end with an evaluation of the adequacy of trial counsel's investigative efforts and the validity of his strategic choices. Not every breach of the duty to investigate lays the basis for the issuance of a writ of habeas corpus. A petitioner who seeks resentencing through allegations of a discrete failure by his trial attorney's investigation of, and preparation for, his sentencing hearing may not rest on proof only of the failure alleged and its constitutional dimension. He also shoulders the burden of proving that his counsel's ineffectiveness resulted in an actual and substantial disadvantage to the course of his defense. *Washington v. Strickland*, 693 F.2d at 1258–59, 1262; accord *Youngblood v. Maggio*, 696 F.2d 407, 409, (5th Cir.1983); *Williams v. Maggio*, 679 F.2d at 392; *Washington v. Watkins*, 655 F.2d at 1356, 1362–63 and n. 32; *Gray v. Lucas*, 677 F.2d at 1094. A failure to prove that he was prejudiced, like a failure to prove that his attorneys' efforts were inadequate, results in denial of the writ. *Id.* The steps are equally important, and equally essential.

[10] Baldwin's argument does not analyze ambiguities in the question of the adequacy of his trial attorneys' preparation for his sentencing hearing. He claims that his is the clear case: his trial counsel simply did nothing to prepare for his penalty proceeding, he charges, and in result presented a far weaker case for amelioration of his punishment than they might have done.

Baldwin's attorneys put on a case for mitigation of punishment based on their client's good character in the years preceding his offense. Three witnesses close to the petitioner offered emotion-charged pleas for mercy. Baldwin's wife and his stepdaughters Michelle and Doris described his years of hard work and dedication to his family. The girls emphasized the love he had shown equally to his biological children and stepchildren, and the sense of moral responsibility he had instilled in them. His wife spoke of his deepening sense of failure and futility in the face of worsening financial problems and the heavy drinking he had turned to after years of near abstinence; she recalled his intelligence, compassion and capabilities, and spoke of their three young children who still needed a father.

Baldwin now argues that his trial counsel put on this case for want of anything else. He charges that they did not begin to prepare for the sentencing hearing until the guilt trial was underway, and that they did not seek out witnesses who could have added a broader, unbiased dimension to his plea. The State counters by defending his trial attorneys' presentation as a reasonable tactical choice. If the truth of the matter is, as Baldwin claims it to be, that his trial

attorneys simply failed to make a reasonably substantial investigation into the availability of mitigating character evidence, his attorneys are guilty of a clear violation of their duty to provide effective assistance. *Washington v. Strickland*, 693 F.2d at 1252; *Davis v. Alabama*, 596 F.2d at 1219, 1221. Baldwin's good character was the sole defense presented at the sentencing hearing. No trial strategy can validate a decision to forgo reasonably substantial preparation for and investigation into the defendant's one plausible line of defense. *Id.* If, on the other hand, his attorneys made a conscious, informed tactical decision to present only the testimony of his family members, their effectiveness can be judged only on an evaluation of the quality of that tactical choice and its underlying assumptions. *Id.* at 1253 n. 16, 1256; *Williams v. Maggio*, 679 F.2d at 392. The issue comes down to the truth of Baldwin's allegations that his attorneys took no steps to prepare for his sentencing hearing, and called his wife and daughters to the stand only in desperation. If our decision hinged on this question, we would be obliged to remand the matter to the district court for an evidentiary hearing. *Hickerson v. Maggio*, 691 F.2d 792, 795 (5th Cir.1982); *Rummel v. Estelle*, 590 F.2d at 105. But those inquiries are pretermitted by our decision that he has not shown actual and substantial prejudice to have accrued from his attorneys' course.[15]

Baldwin has offered the affidavits of eleven people who say they would have testified for him at his sentencing hearing if they had been asked. All attest to his good character, kind nature, and hard work. But none had known him for a prolonged period of time, and none had been in contact with him during at least the two years prior to his offense. Some knew him only slightly, as the courteous, industrious man who had put siding on their houses; others had been neighbors or co-workers for a while in the mid-1970's. One was a cousin close to Baldwin while they were children; another was a parish priest whose services the Baldwins had attended in 1973 and 1974. Their testimony would have served only to corroborate the portrait of the man sketched by his wife and daughters. It would have been largely cumulative, and from sources whose relationships with Baldwin were, both in time and intensity, remote from his offense. *Brooks v. Estelle*, 697 F.2d at 589; *Williams v. Maggio*, 679 F.2d at 392; *Gray v. Lucas*, 677 F.2d at 1094. We cannot conclude that this evidence was of such significance that its omission worked an actual, substantial prejudice to the course of Baldwin's defense. For this lack of prejudice, his claim must be denied.

IV.

Careful examination of Baldwin's charges of ineffective assistance has led us to the conclusion that the courses he claims his trial attorneys should have taken would not have been of substantial benefit to his defense. The judgment of the district court denying his petition for habeas corpus is accordingly affirmed.

AFFIRMED.

15. Baldwin also complains that his trial attorneys failed to prepare his wife and stepdaughters for their testimony at the sentencing hearing, that his attorney's closing argument was lackluster, and that he failed to mention that Baldwin had no prior record of violent crime. But he does not specify how his family's testimony might have been improved; neither does he deny that emphasis on the absence of violence in his criminal record would have served as well to underscore his prior criminal activities. As to the alleged deficiencies in the closing argument, we decline to embark on a course of regulation of rhetoric condemned not for impropriety, but for an absence of intensity.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-3318

U.S. COURT OF APPEALS
FILED
JUN 23 1983
GILBERT E. GANUCHEAU
CLERK

TIMOTHY GEORGE BALDWIN,

Petitioner-Appellant,

versus

ROSS MAGGIO, JR., Warden, Louisiana State Penitentiary, and WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana,

Respondents-Appellees.

- - - - -

Appeal from the United States District Court for the Western District of Louisiana

- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 16, 1983, 5 Cir., 1983, _____F.2d____).

(JUNE 23, 1983)

Before RUBIN and JOHNSON, Circuit Judges, and PARKER,* District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

United States Circuit Judge

*John V. Parker, Chief Judge REHG-6
of the Middle District of Louisiana, sitting by designation

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-3318

PUBLISH

TIMOTHY GEORGE BALDWIN,

Petitioner-Appellant,

versus

ROSS MAGGIO, JR., Warden,
Louisiana State Penitentiary, and
WILLIAM J. GUSTE, JR., Attorney General
of the State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana

(SEPTEMBER 1, 1983)

Before RUBIN and JOHNSON, Circuit Judges, and PARKER*, District Judge.

RUBIN, Circuit Judge:

*Chief Judge of the
Middle District of Louisiana,
sitting by designation

Timothy Baldwin has asked us to stay the issuance of our mandate denying his petition for habeas corpus, pending filing and disposition of his petition for a writ of certiorari to the Supreme Court. Baldwin's conviction has been reviewed by the Louisiana Supreme Court twice, once on direct appeal and again on his application for a writ of habeas corpus. He has twice sought a writ of certiorari from the United States Supreme Court and both applications have been denied. We have fully reviewed his contentions that his constitutional rights were violated and have found them meritless. His claims have by now been presented to eight different state justices and judges and, including the applications to the Supreme Court, to sixteen different federal judges, in most instances more than one time. Not a single judge has found them valid. We ourselves examined them with meticulous care and found them to lack merit. We, therefore, deny the stay and explain our reasons.

A Louisiana trial court convicted Baldwin of capital murder in 1978 and sentenced him to death. Following his exhaustion of direct appellate remedies, State v. Baldwin, 388 So.2d 664 (La. 1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 901, 66 L.Ed.2d 830 (1981), and the failure of his initial application for post-conviction relief, Baldwin v. Blackburn, 524 F. Supp. 332 (W.D. La.), aff'd, 653 F.2d 942 (5th Cir. 1981), cert. denied, 456 U.S. 950, 102 S.Ct. 2021, 72 L.Ed.2d 475 (1982), the Louisiana trial court set his execution for May 27, 1982. 1/ Baldwin again sought a writ of habeas corpus from the

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1/ Baldwin also filed an application for a writ of habeas corpus in the Louisiana District Court. This application was denied on March 26, 1981, and the Louisiana Supreme Court denied review on March 27, 1981. See Baldwin v. Blackburn, 524 F. Supp. at 336.

federal district court and this application was denied. On May 24, 1982, we stayed his execution pending consideration of the merits of his claims. On May 16, 1983, we affirmed the district court's denial of habeas corpus. Baldwin v. Maggio, 704 F.2d 1325 (5th Cir. 1983). Baldwin filed a timely petition for rehearing, thereby delaying the issuance of our mandate pending disposition of that petition, Fed. R. App. P. 41(a). We denied the petition for rehearing on June 23, 1983. Baldwin then timely filed the present request for a stay of our mandate pending his filing a petition for certiorari. Our mandate has again been withheld pending disposition of this request. Loc. R. 27.

Our evaluation of Baldwin's request is governed by well-established standards for granting a stay of a mandate pending disposition of a petition for certiorari:

> [T]here must be a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot v. Estelle, 51 U.S.L.W. 5189, 5194 (U.S. July 6, 1983) (quoting White v. Florida, 457 U.S. _____, 103 S.Ct. 1, _____ L.Ed.2d _____ (1982) (Powell, Circuit Justice)), Barefoot emphasizes that, when a petitioner under imminent threat of execution has made a substantial showing of a denial of a federal right, he must be afforded an adequate opportunity to present the merits of his argument, and he must receive a considered decision on the merits of his claim. 51 U.S.L.W. at 5193. When the court has expedited its decisional process, a denial of a stay of execution to a petitioner presenting a "question of some substance," Id. at 5193 n.4, is "tolerable" if and only if the expedited procedures provide adequate time and means for rendition of a considered judgment on the merits prior to the scheduled execution date. Id. at 5193.

But, even after expedited procedures, "[s]tays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari . . . ." Id. at 5194. "When the process of direct review — which, if a federal question is involved, includes the right to petition [the Supreme] Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." Id. at 5191.

Here the procedure was conventional and deliberate. We have twice stayed Baldwin's execution pending review of his appeal on the merits. Moreover, we withheld our most recent opinion to have the benefit of the Supreme Court's decisions during the entire 1982 Term. Baldwin has also had two earlier opportunities to present to the full Supreme Court claims that his death sentence was imposed unconstitutionally. He is not seeking a stay to permit completion of direct review. 2/

2/ See Williams v. Missouri, 52 U.S.L.W. 3009 (U.S. July 6, 1983), (Blackmun, Circuit Justice).

Nonetheless, if Baldwin's petition for a stay establishes a reasonable probability that certiorari will be granted and a significant possibility that our decision will be reversed, 3/ we must grant a stay to allow adequate time for considered deliberation of

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3/ Because our mandate has not yet issued, the Louisiana trial court charged with setting Baldwin's execution date has not yet resumed jurisdiction over the matter. For that reason, no execution date is presently pending. In White v. Florida, Justice Powell held that a petitioner under sentence of death was not entitled to a stay of execution pending filing and disposition of

> a petition for certiorari; there was no threat of imminent harm since no execution date had been set and the state did not contemplate that one would be set in the near future. _____ U.S. at _____, 103 S.Ct. at 1, _____ L.Ed.2d at _____. We assume that the circumstances here warrant consideration of the stay application because Louisiana has not assured us that no execution date is likely to be set in the immediate future. Louisiana law requires the court of original jurisdiction to fix an execution date not less than thirty days nor more than forty-five days from the dissolution of our stay. La. Rev. Stat. Ann § 15:567 (West Supp. 1983). We act now to avoid the frantic urgency created by the all-too-common eleventh-hour pleas for relief. Not long ago, we criticized counsel for creating just such an emergency by failing earlier to seek a stay of the issuance of our mandate pending filing and disposition of a petition for certiorari, Smith v. Balkcom, 677 F.2d 20, 21 (5th Cir.), cert. denied, _____ U.S. _____, 103 S.Ct. 181, _____ L.Ed.2d _____ (1982). The requisite of irreparable harm and the need for orderly deliberation are both satisfied by Baldwin's present attempt to forestall the rescheduling of his execution.

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his petition for certiorari. We are, of course, acutely aware that the Supreme Court "generally places considerable weight on the decision reached by the circuit courts in these circumstances." Barefoot, 51 U.S.L.W. at 5194; accord Commodity Futures Trading Commission v. British American Commodity Options Corp., 434 U.S. 1316, 1319, 98 S.Ct. 10, 12, 54 L.Ed.2d 28, _____ (1977) (Marshall, Circuit Justice).

Baldwin's request for a stay is premised on the Supreme Court's grants of certiorari in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), cert. granted, 51 U.S.L.W. 3871 (U.S. June 6, 1983) (No. 82-1554) and Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982) (per curiam), cert. granted, _____ U.S. _____, 103 S.Ct. 1425, _____ L.Ed.2d _____ (1983). The en banc decision in Washington announced our standards for finding ineffective assistance of counsel and for determining whether the prejudice caused by counsel's ineffectiveness warrants habeas corpus relief. We applied those standards in denying Baldwin's claims of ineffective assistance. Baldwin, 704 F.2d at

1130, 1333-34. The propriety of those standards is squarely presented by the petition for certiorari in Washington v. Strickland, but that petition was filed by the state, seeking a more lenient prejudice standard than the one we applied. 4/ As set forth in the footnote,

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4/ The petition for certiorari has been summarized as follows:

> Ruling below:
>
> Habeas petitioner claiming ineffective assistance of counsel must show that counsel's reasonable, strategic choice to pursue only one of several plausible defenses worked to his actual and substantial prejudice before relief will be granted; ultimate burden, however, remains on state to show that any constitutional error that did occur was harmless beyond reasonable doubt; remand is in order in this case, both to allow district court to make findings about trial counsel's alleged failure to investigate and also because of district court's improper consideration of Florida trial judge's testimony.
>
> Questions presented: (1) Has court of appeals, in expressly overruling Florida Supreme Court and expressly rejecting en banc opinion of another federal court of appeals, U.S. v. DeCoster, 624 F.2d 196 (C.A.D.C. 1976 [sic]), applied correct standard for review of claims of ineffective assistance of counsel? (2) Did court of appeals misapply Fayerweather v. Ritch, 195 U.S. 276 (1904), to exclude testimony of state trial judge, testifying as expert and as presiding judge, that new evidence offered by habeas petitioner would make no difference upon imposition of sentence? (3) Did court of appeals correctly reverse denial of habeas petitioner's habeas application while failing to consider or apply presumptive validity and factual findings of four state courts and federal district court? (4) Did habeas petitioner abuse habeas writ?

Strickland v. Washington, 51 U.S.L.W. 3831 (May 17, 1983) (No. 82-1554).

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the state's petition for certiorari relies on the difference between our Washington v. Strickland standard and the more demanding standard adopted by the District of Columbia Circuit in United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc).

On Baldwin's charge that counsel was ineffective, we cannot find a reasonable probability that four members of the Supreme Court will find his position sufficiently meritorious to grant certiorari. Nor do we see a significant possibility of reversal of our decision on that issue.

Pulley involves the question whether the Constitution requires that a court of statewide jurisdiction conduct any "proportionality review" of death sentences, and, if so, the requisites of such a review. 5/ The question Baldwin presents is whether the Louisiana

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5/ The petition for certiorari has been summarized as follows:

> Ruling below:
>
> As interpreted in Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), Constitution requires as prerequisite for imposition of death penalty that court conduct "proportionality review" for purpose of comparing defendant's sentence to other sentences imposed for similar crimes.
>
> Questions presented: (1) Does Constitution, in addition to procedures whereby trial court and jury impose death sentence, require any specific form of "proportionality review" by court of statewide jurisdiction prior to execution of state death judgment? (2) If so, what is constitutionally required focus, scope, and procedural structure of such review?

Pulley v. Harris, 51 U.S.L.W. 3590 (Feb. 15, 1983) (No. 82-1095).

Supreme Court, which under the Louisiana capital punishment statute reviews death sentences meted out by juries, violates the federal Constitution by reviewing those sentences on a district-by-district rather than a statewide basis. 6/ Even if the Court in

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6/ Our consideration of that claim was foreclosed by the en banc court's rejection of an identical claim in Williams v. Maggio, 679 F.2d 381, 394-95 (5th Cir. 1980) (en banc), cert. denied, 51 U.S.L.W. 3920 (U.S. June 27, 1983) (No. 82-5868). See Baldwin, 704 F.2d at 1326 n.2. Justice Brennan stayed the effect of the denial of certiorari in Williams by order of July 14, 1983.

We note that Justice Dennis of the Louisiana Supreme Court, who is of the view that statewide rather than district-by-district review is constitutionally required, nevertheless concurred in the court's affirmance of Baldwin's sentence. He stated: "[T]he extraordinary deliberateness and brutality of this murder of an 84-year old woman for her valuables clearly justifies the death penalty without need of extensive comparison with other offenses." State v. Baldwin, 388 So.2d at 678 (Dennis, J., concurring).

Pulley decides that proportionality review is constitutionally required, we find no reasonable basis for concluding that the Court will require the statewide review that we declined to require in Williams. This conclusion is reinforced by the denial of review, albeit now stayed, in Williams. See supra note 6. In short, we can find no reasonable probability of a grant of certiorari and no substantial possibility of reversal of our decision on that ground.

Petition for stay DENIED.

No. 82-3318, Baldwin v. Maggio

JOHNSON, Circuit Judge, dissenting:

The controlling legal standards utilized by this panel in affirming the district court's denial of Timothy Baldwin's petition for habeas corpus relief presently lie in legal limbo, the Supreme Court having granted certiorari in the two controlling cases that governed this panel's decision. See Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), cert. granted, 51 U.S.L.W. 3871 (U.S. June 6, 1983) (No. 82-1554) and Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982) (per curiam), cert. granted, --- U.S. ---, 103 S.Ct. 1425 (1983). That the Supreme Court may in the very near future alter the standards applied in determining whether Baldwin's trial met with the requirements of basic constitutional law seems inarguable.

What this Court has before it for consideration should be clearly understood: it is a request for a stay of the issuance of this Court's mandate pending only the filing and disposition of his petition for a writ of certiorari to the Supreme Court. The temporary nature of the requested stay is self-evident. This being true, I simply cannot sanction Timothy Baldwin's execution knowing that the Supreme Court may, in the very near future, alter or reject the constitutional standards applied in denying Baldwin's petition. This Court should not permit the ultimate punishment to be exacted when live, fundamental constitutional issues remain unresolved in a defendant's appeal. Accordingly, I respectfully dissent from my colleagues' denial of Timothy

Baldwin's request for a stay of our mandate pending filing and disposition of his petition for a writ of certiorari in the Supreme Court.

Barefoot v. Estelle, 51 U.S.L.W. 5189 (U.S. July 6, 1983) teaches that when a petitioner under imminent threat of execution has made a substantial showing of a denial of a federal right, he must be afforded an adequate opportunity to present the merits of his argument, and he must receive a considered decision on the merits of his claim. Id. at 5193. A denial of a stay of execution to a petitioner presenting a "question of some substance," ibid. at note 4, is "tolerable," ibid., if and only if expedited procedures provide adequate time and means for rendition of a considered judgment on the merits prior to the scheduled execution date. Ibid.

Baldwin's request is, of course, in a different posture than was Barefoot's: Baldwin has received the plenary review of his appeal of right to this Court that was at stake in Barefoot, and now requests a stay in order to seek the discretionary review of the Supreme Court. But the constitutional imperative -- that the State cannot take a life in the name of justice until justice has been given to the one condemned -- does not melt away as the procedural posture of the petition changes. Orderly consideration of the substantial constitutional questions remaining after plenary appellate review is, like a thorough and considered decision in the Court of Appeals itself, requisite to the administration of justice under law.

Baldwin's petition for a stay is premised on the Supreme Court's grants of certiorari in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc), cert. granted, 51 U.S.L.W. 3871 (U.S. June 6, 1983) (No. 82-1554) and Pulley v. Harris, 692 F.2d 1189 (9th Cir. 1982), cert. granted, 103 S.Ct. 1425 (1983). The en banc decision in Washington announced our standards for finding ineffective assistance of counsel and for determining whether prejudice accruing on ineffective assistance warrants habeas corpus relief. Our refusal to accept Baldwin's two claims of ineffective assistance of counsel turned in each instance on our decision that he had failed to show the "actual, substantial prejudice" demanded by Washington to establish a constitutional defect in the adequacy of representation.[1] The propriety of that test is squarely presented by the petition for certiorari.[2]

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1. Washington v. Strickland's standards were central to our decision. Indeed, we delayed our decision of Baldwin's appeal pending decision of that case and solicited supplemental briefs from the parties on its significance to the issues under review.

2. The petition for certiorari has been summarized as follows:

> Ruling below:
>
> Habeas petitioner claiming ineffective assistance of counsel must show that counsel's reasonable, strategic choice to pursue only one of several plausible defenses worked to his actual and substantial prejudice before relief will be granted; ultimate burden, however, remains on state to show that any constitutional error that did occur was harmless beyond reasonable doubt; remand is in

Pulley involves questions of the constitutional necessity of a "proportionality review" of death sentences by a court of state-wide jurisdiction, and the requisites of such a review.[3]

> order in this case, both to allow district court to make findings about trial counsel's alleged failure to investigate and also because of district court's improper consideration of Florida trial judge's testimony.
>
> Questions presented: (1) Has court of appeals, in expressly overruling Florida Supreme Court and expressly rejecting en banc opinion of another federal court of appeals, U.S. v. DeCoster, 624 F.2d 196 9C.A.D.C. 1976), applied correct standard for review of claims of ineffective assistance of counsel? (2) Did court of appeals misapply Fayerweather v. Ritch, 195 U.S. 276 (1904), to exclude testimony of state trial judge, testifying as expert and as presiding judge, that new evidence offered by habeas petitioner would make no difference upon imposition of sentence? (3) Did court of appeals correctly reverse denial of habeas petitioner's habeas application while failing to consider or apply presumptive validity and factual findings of four state courts and federal district court? (4) Did habeas petitioner abuse habeas writ?

Strickland v. Washington, 51 U.S.L.W. 3831 (U.S. May 17, 1983) (No. 82-1554).

3. The petition for certiorari has been summarized as follows:

> Ruling below:
>
> As interpreted in Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), Constitution requires as prerequisite for imposition of death penalty that court conduct "proportionality review" for purpose of comparing defendant's sentence to other sentences imposed for similar crimes.
>
> Questions presented: (1) Does

In his petition for habeas corpus, Baldwin presented a similar question, i.e., that the Louisiana Supreme Court's practice of conducting its proportionality reviews of sentences meted out in capital murder cases on a district-by-district basis fails to satisfy the eighth and fourteenth amendments to the United States Constitution. He conceded on appeal that our consideration of that claim was foreclosed by our earlier rejection en banc of the identical claim in Williams v. Maggio, 679 F.2d 381, 394-95 (5th Cir.) (en banc), petition for cert. pending (U.S. Dec. 10, 1980) (No. 82-5868). Baldwin v. Maggio, 704 F.2d at 1326 n.1.

I think that the presence of these issues -- particularly the propriety of Washington's standards for evaluating claims of ineffective assistance of counsel -- before the Supreme Court requires that we stay our mandate pending filing and disposition of a petition for certiorari, see ante note 1. Though the Supreme Court may not, in the course of its decisions of Washington and Pulley, reach the issues implicated in Baldwin's case, I think that its grant of review of those petitions requires a present conclusion that all of the issues the

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> Constitution, in addition to procedures whereby trial court and jury impose death sentence, require any specific form of "proportionality review" by court of statewide jurisdiction prior to execution of state death judgment? (2) If so, what is constitutionally required focus, scope, and procedural structure of such review?

Pulley v. Harris, 51 U.S.L.W. 3590 (U.S. Feb. 15, 1983) (No. 82-1095).

petitions raise are "cert-worthy." The questions of law presented by those cases are not so clearly settled that I can, with confidence, predict that the Court's decision will endorse our own. Acceleration of an admittedly deliberate appellate process should not come at the expense of the defendant's life, when fundamental constitutional issues remain unresolved in his case. As Judge Goldberg noted so poignantly concurring in Bass v. Estelle, 696 F.2d 1154, 1161 (5th Cir. 1983), "There can be no writs of habeas corpus from a casket."

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

TIMOTHY GEORGE BALDWIN :

-vs- : CIVIL ACTION NO. 82-1249

ROSS MAGGIO, WARDEN, LOUISIANA: STATE PENITENTIARY, ET AL

O R D E R

Petitioner, having exhausted his State remedies, presents to this court his second Application for Stay of Execution and Petition for Writ of Habeas Corpus by a Person in State Custody under 28 U.S.C. § 2254. Three claims are raised by petitioner:

> Claim 1 - Trial counsel proved ineffective in failing to move for a new trial upon discovery of allegedly exculpatory evidence five months after trial.
>
> Claim 2 - Trial counsel proved ineffective in failing to properly prepare or present petitioner's case at the sentencing phase of the trial.
>
> Claim 3 - The Louisiana Supreme Court's district-wide proportionality review of death sentences fails to ensure the fairness of capital punishment in this State.

Having thoroughly reviewed the trial record previously and the instant petition, we find no need for an evidentiary hearing on the first two claims. *Baldwin v. Blackburn*, 653 F.Supp. 942, 946-47 (5th Cir. 1981); See Clark v. Blackburn, 519 F.2d 431,

432 (5th Cir. 1980). Nor does the third claim, legal in nature, call for an evidentiary hearing.

CLAIM 1

This Sixth Amendment claim, presented on petitioner's first habeas appeal to this court and the Fifth Circuit, was rejected by both. *Baldwin v. Blackburn*, 524 F.Supp. 332, 337-38 (W.D. La. 1981), *aff'd* 653 F.2d 942, 947 (5th Cir. 1981), *cert. denied* 449 U.S. 1101 (1981).

Present counsel frames this argument in a new light by asserting that prior habeas counsel were also ineffective in failing to adequately present this claim. Neither trial counsel nor prior habeas counsel were ineffective.

The new evidence in question is an El Dorado, Arkansas motel receipt bearing no check-in time but only the date of the crime. In conjunction with certain testimony which we reviewed in making our prior ruling, counsel asserts that a viable alibi defense was available to show that petitioner could not possibly have been at the scene of the crime during the hours of its commission.

Considering the overwhelming evidence of guilt and the self-serving nature of the testimony necessary to show the motel receipt in an exculpatory light, we again reject this claim.

CLAIM 2

We also reject this Sixth Amendment claim. During the sentencing phase of petitioner's trial, the State did not make a presentation but offered the evidence and testimony adduced at trial. Defense counsel had petitioner's wife and two

step-daughters testify.*/ It is argued that other people who knew but were not related to petitioner were willing to provide favorable character testimony but that counsel, due to inadequate preparation, failed to seek them out.

In reviewing the affidavits of these potential witnesses which are attached to the petition herein, we note that none of them maintained regular contact with petitioner after 1976. The crime occurred in April of 1978. None of the affiants were closely associated with petitioner, except for a first cousin who had not been familiar with petitioner since childhood. Otherwise the length of time they had associated with petitioner ranged from ten days to about a year and a half. We find that the failure to present such testimony did not constitute ineffective assistance of counsel.

Petitioner attacks counsel's presentation overall at the sentencing phase as too brief (50 minutes). Brevity does not in itself indicate ineffective assistance of counsel. Petitioner's prior "Non-violent" criminal record was not spoken of. We cannot say that this was an omission borne of incompetence. Had this been mentioned, counsel could be accused of incompetence for unduly underscoring petitioner's prior criminal activities.

Mindful of the Fifth Circuit's most recent pronouncement in *Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982), we find that this claim is without merit.

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*/ Counsel argues that this testimony is clearly not objective and therefore not persuasive to the jury, yet somewhat incongruously asserted supra that trial counsel was ineffective in failing to pursue the motion for new trial based upon new evidence that required the support of self-serving testimony to establish a circumspect alibi defense. We take an opposite view. Character evidence quite often comes from a witness who is closely associated with a defendant and is more plausible than testimony by the same person in support of an affirmative defense.

CLAIM 3

This legal argument, bearing upon the Eighth Amendment's prohibition of cruel and unusual punishment, was raised before and rejected by this court and the Court of Appeals. *Baldwin v. Blackburn*, 524 F.Supp. at 341, 653 F.2d at 953. However, petitioner points out that the Fifth Circuit has held an *en banc* rehearing in *Williams v. Blackburn*, 649 F.2d 1019 (5th Cir. 1981), *rehearing en banc granted*, 661 F.2d 1020 (5th Cir. 1981), which encompasses this issue. We note that other issues, not alleged to be pertinent to this petition, are raised in *Williams*.

Louisiana's proportionality review of death sentences is provided under La.Code Crim.P. 905.9 and La. Supreme Court R. 28. Regarding such procedures the Supreme Court "has never put forth any one system as sacrosanct." *Baldwin v. Blackburn*, 653 F.2d at 953. The attempt to discredit Louisiana's review for being district-wide instead of state-wide proves "unconvincing" for in fact, some state-wide comparison is inevitably undertaken. *Id.*

Our opinion and that of the Fifth Circuit in upholding the Louisiana Supreme Court's proportionality review in light of Eighth Amendment standards was unequivocal. Until this procedure is explicitly rejected by the Fifth Circuit, we will not presume that it is constitutionally infirm.

Based upon the foregoing, it is ORDERED that petitioner's Application for Stay of Execution be and it is hereby DENIED. It is further ORDERED that petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody be and it is hereby DENIED.

DONE AND SIGNED at Alexandria, Louisiana, on this the 20th day of May, 1982.

UNITED STATES DISTRICT JUDGE

APPENDIX E

Note 8

of violation has been established. State v. Duncan, Sup.1981, 396 So.2d 297.

9. Concurrent or consecutive sentence

While the trial court, noting that defendant was on probation for a prior misdemeanor conviction, stipulated that his sentence for burglary was to run consecutively with any other sentence he might receive, only the court which originally granted the suspension of sentence and probation could, in the event of revocation on that prior offense, determine whether defendant should serve the sentences concurrently or consecutively. State v. Donnaway, Sup.1982, 410 So.2d 231.

Art. 902. Drug addict; pre-sentence investigation; conditions of probation

A. Upon the rendering of a guilty verdict or judgment, the district attorney, with the written consent of the division of probation and parole, may, by ex parte motion, stating the belief that the defendant is a drug addict, whether the crime charged is related to drug abuse or not, request the court to order the division of probation and parole to conduct a presentence investigation for the purpose of determining whether or not the defendant is a drug addict. The presentence investigation may be ordered in the discretion of the court.

B. Upon receiving the report of the presentence investigation, the court may, in its discretion, if it finds probable cause from such report to believe the defendant to be a drug addict, order a contradictory hearing for the purpose of making a judicial determination of such issue.

C. If, at such contradictory hearing, the court finds that the defendant is a drug addict, and it is the court's desire to suspend any sentence which it may impose and place the defendant on probation, it may require as a condition of probation that the defendant submit to urinalysis or any acknowledged recognized test given at reasonable intervals not to exceed once a week, and at reasonable times in accordance with the request of the division of probation and parole. If the defendant refuses to submit to the tests, the sentencing court may revoke the probation. If the defendant submits to the tests, upon the first instance of a test proving positive for the presence of a controlled dangerous substance, as defined in R.S. 40:963, the sentencing court may commit the defendant to a medical clinic for treatment for a period not to exceed the period of probation. Upon a second positive result, the sentencing court shall revoke the probation and impose the sentence.

Added by Acts 1972, No. 177, § 1.

Library References

Drugs and Narcotics ⇐133.

CHAPTER 3. SENTENCING IN CAPITAL CASES

Art.
905. Capital cases; sentencing hearing required.
905.1. Sentencing hearing jury; commencement.
905.2. Sentencing hearing; procedure and evidence.
905.3. Sentence of death; jury findings.
905.4. Aggravating circumstances.
905.5. Mitigating circumstances.
905.6. Jury; unanimous recommendation.
905.7. Form of recommendations.
905.8. Imposition of sentence.
905.9. Review on appeal.

Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Added by Acts 1976, No. 694, § 1.

Title of Act:

An Act to Amend Title XXIX of the Louisiana Code of Criminal Procedure by adding thereto a new Chapter, to be designated as Chapter 3 thereof, to be composed of Articles 905 through 905.9 thereof, both inclusive, to provide with respect to sentences and sentencing procedures in capital cases, including provisions to provide that a sentence of death may be imposed only after a sentencing hearing by the jury which determined

must remain within specific guidelines and must find existence of at least one aggravating circumstance before recommending death. Id.

11. Instructions

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, informing jury during guilt phase of case that it could consider the responsive verdict of second-degree murder was not reversible error, in light of fact that the second-degree murder statute (LSA-R.S. 14:30.1) applicable to the prosecution was responsive to the charge of first-degree murder and that, in light of fact that defendant was found guilty of first-degree murder, there could have been no prejudice. State v. Monroe, Sup.1981, 397 So.2d 1258.

Art. 905.1. Sentencing hearing jury; commencement

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellant court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 2 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Added by Acts 1976, No. 694, § 1. Amended by Acts 1977, No. 105, § 1.

Notes of Decisions

Presence of witness 2
Remand 1
Validity ½

½. Validity

Article of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing imposition of death sentence did not violate Eighth and Fourteenth Amendment (U.S.C.A.Const.Amends. 8, 14) rights of habeas corpus petitioner. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

Articles of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing procedures for imposition of death sentence are presumed valid. Id.

1. Remand

Upon finding reversible error in postverdict sentencing hearing in a homicide prosecution, reviewing court should not reverse conviction, but only sentence of death, and should remand case in order that trial court may resentence convicted defendant to life imprisonment without benefit of probation, parole, or suspension of sentence. State v. English, Sup.1979, 367 So.2d 815.

2. Presence of witness

In proceeding in which defendant was convicted of first-degree murder, failure to sequester certain witnesses after completion of guilt determination phase of trial was not shown to have prejudiced defendant where, though defendant asserted that district attorney placed his witnesses in front rows, closest to jury, so as to remind jury of witnesses' testimony, it was not alleged that any of the nonsequestered witnesses were recalled to testify at sentencing hearing. State v. Toomer, Sup. 1981, 395 So.2d 1320.

Art. 905.2. Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Added by Acts 1976, No. 694, § 1.

tionally deficient. State v. Berry, Sup.1980, 391 So.2d 406, concurred in part, dissented in part 396 So.2d 880, certiorari denied 101 S.Ct. 2347, 451 U.S. 1010, 68 L.Ed.2d 863.

5. Instructions

Despite habeas corpus petitioner's assertion to the contrary, trial court, in its sentencing phase instructions to the jury, made it clear that nonunanimous verdict automatically barred imposition of death sentence. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, informing jury during guilt phase of case that it could consider the responsive verdict of second-degree murder was not reversible error, in light of fact that the second-degree murder statute (LSA-R.S. 14:30.1) applicable to the prosecution was responsive to the charge of first-degree murder and that, in light of fact that defendant was found guilty of first-degree murder, there could have been no prejudice. State v. Monroe, Sup.1981, 397 So.2d 1258.

6. Mitigating circumstances

Having found a statutory aggravating circumstance, jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstances so found, before recommending either a penalty of life imprisonment, without parole or a sentence of death. State v. Willie, Sup.1982, 410 So.2d 1019.

Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Added by Acts 1976, No. 694, § 1.

Law Review Commentaries

Criminal law—work of the legislature, 1978. 39 La.L.Rev. 227 (1978).

United States Supreme Court and capital punishment: Uncertainty, ambiguity, and judicial control. Michael W. Combs, 7 Southern U.L.Rev. 1 (1980).

Notes of Decisions

Aggravating circumstances 1.8
Argument and conduct of counsel 3.6
Burden of proof 2
Construction and application 1
Findings 3.9
Instructions 3.5
Mitigating circumstances 1.9
Passion or prejudice 3
Review 4
Unanimous verdict 3.7
Validity ½

½. Validity

Article of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing imposition of death sentence did not violate Eighth and Fourteenth Amendment (U.S.C.A.Const.Amends. 8, 14) rights of habeas corpus petitioner. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

Articles of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing procedures for imposition of death sentence are presumed valid. Id.

1. Construction and application

Evidence was sufficient to support conclusion that State had proved beyond a reasonable doubt every fact necessary to constitute crime of first-degree murder. State v. Motton, Sup.1981, 395 So.2d 1337, certiorari denied 102 S.Ct. 289, 454 U.S. 850, 70 L.Ed.2d 139.

Jury is not bound to find existence of an aggravating circumstances so as to justify imposition of death penalty merely because jury found defendant guilty of first-degree murder; therefore, use of aggravating circumstance as element of the crime is not unconstitutional on ground that jury which has determined guilt has already determined existence of an aggravating circumstance prior to commencement of the sentencing hearing. State v. Clark, Sup.1980, 387 So.2d 1124, certiorari denied 101 S.Ct. 900, 449 U.S. 1103, 66 L.Ed.2d 830, rehearing denied 101 S.Ct. 1530, 450 U.S. 989, 67 L.Ed.2d 825, dismissed 389 So.2d 1335.

Although trial judge must sentence defendant in accordance with the recommendation of the jury, all discretion has not been placed with the jury, whose recommendation must be based on a finding of at least one aggravating circumstances under C.Cr.P. art. 905.4 and after considering any mitigating circumstances; therefore, C.Cr.P. art. 905.3 did not result in arbitrary and capricious imposition of death penalty. Id.

This article empowers jury to consider death penalty if it correctly finds that one statutory aggravating circumstance exists; as long as jury is required to find at least one statutory aggravating circumstance, jury's discretion is controlled by clear and objective standards so as to produce

Note 3.6

the improper remarks, and the record indicates that jury heeded the admonition. Id.

Prosecutor's argument conveying message that jurors' responsibility, in regard to determining whether death sentence should be imposed, is lessened by fact that their decision is not the final one, or which contains inaccurate or misleading information, deprives defendant of a fair trial and requires that death penalty be vacated. Id.

3.7. Unanimous verdict

Unless penalty proceeding jury determines unanimously that death penalty should be imposed, defendant will be sentenced upon conviction of first-degree murder to life imprisonment without parole, probation or suspension of sentence. State v. Sonnier, Sup.1981, 402 So.2d 650.

3.8. Findings

Standing alone, finding by jury of armed robbery aggravating circumstance supplied basis for imposition of death penalty for first-degree murder. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

4. Review

Death sentence can only be imposed if jury finds beyond a reasonable doubt that at least one of the statutory aggravating circumstances set out in C.Cr.P. art. 905.4 is present, and where the death sentence is recommended, the Supreme Court must determine whether the aggravating circumstances cited by the jury are supported by the evidence. State v. Culberth, Sup.1980, 390 So.2d 847.

By failing to object at trial that none of three aggravating circumstances found by the jury was supported by the record, defense counsel did not waive his objection, as the Supreme Court was empowered by C.Cr.P. art. 905.9 to undertake an independent review of all death sentences. Id.

Art. 905.4. Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Added by Acts 1976, No. 694, § 1. Amended by Acts 1979, No. 74, § 2, eff. June 29, 1979.

Art. 905.5. Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Added by Acts 1976, No. 694, § 1.

Law Review Commentaries

Capital sentencing review under Supreme Court Rule 28. 42 La.L.Rev. 1100 (1982).

Role of mitigating circumstances in considering death penalty. 53 Tulane L.Rev. 606 (1979).

Library References

Criminal Law ⇐986.

C.J.S. Criminal Law §§ 1573, 1575.

Notes of Decisions

In general ½
Accomplices 6
Argument of counsel 5
Instructions 2
Mental disease or defect 3
Other relevant mitigating circumstances 1
Substantive elements of crime 4
Sufficiency of evidence 7
Validity ½

½. Validity

Articles of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing imposition of death sentence did not violate Eighth and Fourteenth Amendment (U.S.C.A.Const.Amends. 8, 14) rights of habeas corpus petitioner. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

Articles of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing procedures for imposition of death sentence are presumed valid. Id.

½. In general

Arguable presence of mitigating circumstances, consisting of defendant's lack of significant prior criminal record and his drug-induced mental disturbance, did not necessarily render death sentence for first-degree murder arising out of grocery store robbery disproportionate. State v. Williams, Sup.1980, 383 So.2d 369.

Record disclosing inconsistency of death recommendation with sentences imposed in similar cases from same jurisdiction, together with disregard of numerous and persuasive mitigating circumstances which outweighed any aggravating circumstances, required conclusion that death sentence for first-degree murder was excessive, especially inasmuch as weight of evidence indicated that defendant had played only subsidiary role in most of the aggravating circumstances and disclosed a large number of persuasive mitigating factors. State v. Sonnier, Sup.1979, 380 So.2d 1.

On consideration of aggravating and mitigating circumstances, imposition of death penalty for first-degree murder was not excessive. State v. Prejean, Sup.1979, 379 So.2d 240, certiorari denied 101 S.Ct. 253, 449 U.S. 891, 66 L.Ed.2d 119, rehearing denied 101 S.Ct. 598, 449 U.S. 1027, 66 L.Ed.2d 489.

1. Other relevant mitigating circumstances

Sentence of 40 years at hard labor imposed upon defendant after his conviction of forcible rape could not stand where record did not indicate that mitigating factors in presentence investigation report were considered or weighed in sentencing and where judge's ruling focused on despicable nature of offense with little or no reference to statutory guidelines for sentencing. State v. Lathers, Sup.1982, 414 So.2d 678.

Capital sentencing proceeding jury may consider as mitigating circumstance that offender was

7. Sufficiency of evidence

Record of sentencing for attempted aggravated burglary supported fact that trial court considered the sentencing guidelines and mitigating factors and supported conclusion that defendant had failed to prove his allegation of intoxication in mitigation. State v. Lodrigs, Sup.1982, 414 So.2d 759.

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Notes of Decisions

Construction and application 1
Instructions 2
Validity ½

½. Validity

Article of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing imposition of death sentence did not violate Eighth and Fourteenth Amendment (U.S.C.A.Const.Amends. 8, 14) rights of habeas corpus petitioner. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

1. Construction and application

Where defendant, convicted of aggravated rape and aggravated kidnapping was sentenced to two consecutive life sentences, but at time of offense there was no alternative life sentence to unconstitutional death sentence available to jury for such rape conviction, defendant's life sentence for rape conviction must be remanded for resentencing for most serious penalty for next lesser included offense—attempted aggravated rape. State v. Burge, Sup.1978, 362 So.2d 1371.

2. Instructions

Jurors in capital sentence hearing had to be informed by trial judge that defendant would be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence, if they were unable to be unanimous on recommendation, at least where jury had deliberated three hours, making substantial attempt to achieve unanimity. State v. Williams, Sup.1980, 392 So.2d 619.

Art. 905.7. Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____

Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____

Foreman"

Added by Acts 1976, No. 694, § 1.

Notes of Decisions

Aggravating circumstances 2

1. Validity

Article of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing imposition of death sentence did not violate Eighth and Fourteenth Amendment (U.S.C.A.Const.Amends. 8, 14) rights of habeas corpus petitioner. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

Articles of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing procedures for imposition of death sentence are presumed valid. Id.

Defendant, who was convicted of first-degree murder and sentenced to death, was not entitled to relief on appeal on basis of contention that this article pertaining to form of jury recommendation to be used was unconstitutionally vague and ambiguous due to failure to provide that jury was to be informed that defendant would be sentenced to life imprisonment if jury failed to make unanimous sentencing recommendation, in light of fact that under the charge given to jury, a reasonable juror could have inferred that failure to reach unanimous sentence recommendation would result in life imprisonment. State v. Myles, Sup. 1979, 389 So.2d 12.

2. Aggravating circumstances

In event capital sentencing, proceeding jury imposes death penalty, it must designate in writing aggravating circumstance which is found to exist beyond reasonable doubt. State v. Sonnier, Sup. 1981, 402 So.2d 650.

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Library References

Criminal Law ⇐749.

C.J.S. Criminal Law § 1141.

United States Supreme Court

Jury consideration of lesser included noncapital offense, see Beck v. Alabama, 1980, 100 S.Ct. 2382, 447 U.S. 625, 65 L.Ed.2d 392.

Notes of Decisions

Construction and application ½
Deadlocked jury 3
Discretion of court 4
Instructions 2
Remand 1
Validity ¼

¼. Validity

Article of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing imposition of death sentence did not violate Eighth and Fourteenth Amendment (U.S.C.A.Const.Amends. 8, 14) rights of habeas corpus petitioner. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

Articles of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing procedures for imposition of death sentence are presumed valid. Id.

½. Construction and application

Defendant, who had been convicted of first-degree murder and was sentenced to death, was not entitled to relief on basis of assertion that trial judge, by informing jurors of the effect of deadlock and allowing further deliberations during sentencing phase, had implied that judge wanted jurors to impose death penalty, in light of fact that judge told jurors that if they could not agree despite further deliberations, they should tell him so. State v. Monroe, Sup.1981, 397 So.2d 1258.

Defendant, who was convicted of first-degree murder and sentenced to death, was not entitled to relief on appeal on basis of contention that C.Cr.P. art. 905.7 pertaining to form of jury recommendation to be used was unconstitutionally vague and ambiguous due to failure to provide that jury was to be informed that defendant would be sentenced to life imprisonment if jury failed to make unanimous sentencing recommendation, in light of fact that under the charge given to jury, a reasonable juror could have inferred that failure to reach unanimous sentence recommendation would result in life imprisonment. State v. Myles, Sup.1979, 389 So.2d 12.

Although trial judge must sentence defendant in accordance with the recommendation of the jury, all discretion has not been placed with the jury, whose recommendation must be based on a finding of at least one aggravating circumstance under C.Cr.P. art. 905.4 and after considering any mitigating circumstances; therefore, this article did not result in arbitrary and capricious imposition of death penalty. State v. Clark, Sup.1980, 387 So.2d 1124, certiorari denied 101 S.Ct. 900, 449 U.S. 1103, 66 L.Ed.2d 830, rehearing denied 101 S.Ct. 1530, 450 U.S. 989, 67 L.Ed.2d 825, dissented 389 So.2d 1335.

In capital case, trial court was required to sentence defendant in accordance with recommendation of jury and had no option as to sentence imposed. State v. Prejean, Sup.1979, 379 So.2d 240, certiorari denied 101 S.Ct. 253, 449 U.S. 891, 66 L.Ed.2d 119, rehearing denied 101 S.Ct. 598, 449 U.S. 1027, 66 L.Ed.2d 489.

1. Remand

Upon finding reversible error in post-verdict sentencing hearing in a homicide prosecution, reviewing court should not reverse conviction, but only sentence of death, and should remand case in order that trial court may resentence convicted

defendant to life imprisonment without benefit of probation, parole, or suspension of sentence. State v. English, Sup.1979, 367 So.2d 815.

2. Instructions

Despite habeas corpus petitioner's assertion to the contrary, trial court, in its sentencing phase instructions to the jury, made it clear that nonunanimous verdict automatically barred imposition of death sentence. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, informing jury during guilt phase of case that it could consider the responsible verdict of second-degree murder was not reversible error, in light of fact that the second-degree murder statute (LRA-R.S. 14:30.1) applicable to the prosecution was responsive to the charge of first-degree murder and that, in light of fact that defendant was found guilty of first-degree murder, there could have been no prejudice. State v. Monroe, Sup.1981, 397 So.2d 1258.

Jurors in capital sentence hearing had to be informed by trial judge that defendant would be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence, if they were unable to be unanimous on recommendation, at least where jury had deliberated three hours, making substantial attempt to achieve unanimity. State v. Williams, Sup.1980, 392 So.2d 619.

3. Deadlocked jury

Trial judge is to determine when a jury is deadlocked during sentencing phase of capital case, and his decision will not be overturned except on a showing of palpable abuse of discretion. State v. Monroe, Sup.1981, 397 So.2d 1258.

4. Discretion of court

Trial judge had authority to allow jurors to resume their deliberations after they announced that they were hung during sentencing phase of first-degree murder case; allowing resumption of deliberation in such case was not abuse of discretion, particularly in light of fact that jurors had deliberated for only 45 minutes. State v. Monroe, Sup.1981, 397 So.2d 1258.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No. 694, § 1.

Cross References

Capital sentence review by Supreme Court, see Supreme Court Rule 28 following this article.

Uniform capital sentence report, see Supreme Court Rules, Vol. 8, LSA-R.S., Appendix B.

Law Review Commentaries

Capital Punishment and Eighth Amendment, 51 Tulane L.Rev. 360 (1977).

Capital punishment—work of Louisiana legislature for 1976 regular session. 37 La.L.Rev. 197 (1976).

Capital sentencing review under Supreme Court Rule 28. 2 La.L.Rev. 1100 (1982).

Library References

Criminal Law ⇐993.

C.J.S. Criminal Law § 1587 et seq.

Notes of Decisions

Construction and application 1
Objections 2
Presumptions and burden of proof 4
Reference by prosecutor to review 3
Validity ½

½. Validity

Article of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing imposition of death sentence did not violate Eighth and Fourteenth Amendment (U.S.C.A.Const.Amends. 8, 14) rights of habeas corpus petitioner. Baldwin v. Blackburn, D.C.1981, 524 F.Supp. 332, affirmed 653 F.2d 942, certiorari denied 102 S.Ct. 2021, rehearing denied 102 S.Ct. 2918.

Louisiana's Code of Criminal Procedure, in providing proportionality review of criminal sentences, afforded defendants full protection under Eighth and Fourteenth Amendments (U.S.C.A. Const.Amends. 8, 14). Id.

Articles of Louisiana Code of Criminal Procedure (C.Cr.P. art. 905 et seq.) governing procedures for imposition of death sentence are presumed valid. Id.

Capital sentencing law (C.Cr.P. art. 905 et seq.) does not deprive a defendant of due process. State v. Monroe, Sup.1981, 397 So.2d 1258.

1. Construction and application

State sentencing scheme requires Supreme Court to review every death sentence to determine if it is excessive, in order to ensure that the ..th penalty is not arbitrarily or capriciously imposed. State v. Culberth, Sup.1980, 390 So.2d 847.

APPENDIX F

Comment

In light of Act 429 of the 1980 Regular Session of the Louisiana Legislature, enacting Title XXXI-A of the Louisiana Code of Criminal Procedure, containing Article 924 through 930.7, relative to post-conviction relief, Rule XXVII as it previously existed is no longer required and is repealed. Act 429 substantially adopts the prior court rules. The uniform application for post-conviction relief is approved pursuant to La.C.Cr.P. art. 926D.

RULE XXVIII. CAPITAL SENTENCE REVIEW

Rule 905.9.1 (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the

sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case,

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, effective Jan. 1, 1978.

RULE XXIX. RESCINDED EFFECTIVE OCT. 20, 1978

PART G. GENERAL ADMINISTRATIVE RULES

(Preamble note: These rules may be cited as "General Administrative Rules, Section _____")

Section 1. Travel and Office Expenses. Rule 13:694.1 (applicable to La.R.S. 13:694, 13:695 and 13:699).

APPENDIX G

Exhibits 2-16 to Petitioner's Federal Habeas Corpus Petition

EXHIBIT 2

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF FATHER WALBERT GALERNA

My name is Father Walbert Galerna and I presently live at 122 Trinity Circle, Crowley, Texas.

I am now retired, but I used to be the parish priest for the Baldwin family when I was pastor at the St. Francis of Assisi Church in Calhoun, Louisiana. At this time the Baldwins lived in nearby Choudrant.

I was pastor at St. Francis of Assisi from 1967 - 1976 and, as their parish priest, I knew the Baldwins for about 1-1/2 years in 1973 and 1974.

At this time, the Baldwins lived in the country. Tim and Rita Baldwin were in church faithfully, and Tim had his family in the front row of the church every Sunday. He and Rita were regular contributors to the church.

Tim seemed to be a polite man and a hard worker. He was nice to his family and was trying to get ahead, although he was not doing that well financially when I met him.

Tim was a good ordinary man, with no apparent negative characteristics. He was not a drinker or a drug user, as far as I knew or ever heard about.

Tim was very helpful and kind, and even did some repair work on my car for free.

I have nothing bad to say about Tim and the murder he allegedly committed is totally inconsistent with the Tim Baldwin I knew. I wouldn't think he would kill anyone.

After the Baldwins moved to West Monroe, I visited them a few times and my impressions of Tim were the same as when I knew him in Choudrant.

I was never contacted by the trial attorneys for Tim Baldwin, either before or during the trial, and was not asked to testify on Tim's behalf by anyone. I would have been willing to testify as a character witness for Tim Baldwin or at the penalty phase of his trial.

I swear under the pain and penalty of perjury that the foregoing is true and correct.

Fr. Walbert Galerna O.F.M.
FATHER WALBERT GALERNA, AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME this 12th day of May, 1982.

Betty Lieman
NOTARY PUBLIC

My Commission Expires:

1/25/84

EXHIBIT 3

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF JESSIE RISER

My name is Jessie Riser. I live at 1003 Carey Avenue, Ruston, Louisiana. I am the former sheriff of Lincoln Parish, Louisiana, and I am now retired.

Tim Baldwin was foreman of a crew that put sidings and awnings on my house several years ago in the 1970's for about ten days to two weeks. Tim was a good worker and you really couldn't ask for a better man. Tim started work on the house early in the day and would frequently stay until nightfall. He also often came on weekends.

Tim was peaceable and friendly. He was always cooperative. I would have never imagined that he would have done something like a murder. It just doesn't seem like the same person I knew. We must be talking about a different person.

I was not contacted by Tim Baldwin's attorneys before or during his trial and was not asked to testify at his trial. I would have been willing to testify as a character witness or during the penalty phase of his trial.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of May, 1982.

JESSIE RISER, AFFIANT

SWORN AND SUBSCRIBED TO BEFORE ME this 7th day of May, 1982.

NOTARY PUBLIC

Dy. C.D.C. & Ex-Off. a Notary
Lincoln Parish, Louisiana

EXHIBIT 4

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, JR., ATTORNEY
GENERAL OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF JOHNNY WHATLEY

I, Johnny Whatley, hereby swear under pain and penalty of perjury:

My name is Johnny Whatley, and I presently live in Norphlet, Arkansas 71759. I am the husband of Sandy Whatley.

My wife, Sandy, and I were next door neighbors to the Baldwins in West Monroe in 1973 and 1974. Tim was a fine fellow and I consider him to be a good friend. We used to hunt and fish together, and our families frequantly socialized. Tim could stay at my house anytime and I felt that anything I have he could have. I held Tim in the highest regard during the entire time I knew him.

Tim was a very hard worker. All he did when I knew him was work and take care of his family the best he could. Tim was close to his family and very supportive of his family and would do anything for them. An example of this is the time Tim worked all day on a Saturday job and relaxed a little that night by fishing until 3:00 a.m. The next morning (Sunday) he got up early to finish a job in order to make a little more money for his family.

That is the kind of fellow Tim Baldwin is. He was just a hard working man.

Tim could do anything relating to mechanics, electronics or working with his hands. He would often go out of his way to do things helpful for me.

Tim drank a little socially but definitely not to excess. I never saw him drunk. He didn't have a drug problem or any other bad habits as far as I knew.

When Tim and his wife moved from West Monroe to Arkansas in about 1974, I lost regular contact with them. We did occasionally visit with them and communicate from time to time through 1977, and my feelings about Tim remained the same as when I knew him in West Monroe.

I was under shock and taken totally by surprise by the news of Tim's arrest and conviction for murder. He wasn't that kind of man. I don't believe he did it.

I was never contacted by the trial attorneys for Tim Baldwin either before or during the trial. I was never asked by anyone to testify on Tim's behalf. I would have been willing to testify as a character witness for Tim Baldwin or at the penalty phase of his trial.

Johnny Whatley

JOHNNY WHATLEY, AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME this 12 day of May, 1982.

Rebecca E. Bennett

NOTARY PUBLIC

My Commission Expires:

4/16/89

EXHIBIT 5

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, JR., ATTORNEY
GENERAL OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF SANDY WHATLEY

I, Sandy Whatley, hereby swear under pain and penalty of perjury:

My name is Sandy Whatley, and I presently live in Norphlet, Arkansas. I am the wife of Johnny Whatley.

We lived next door to the Baldwins in West Monroe in 1973 and 1974. Our families became very close at this time. We often went fishing, camping and on picnics together.

All Tim ever seemed to do was work and put in long hours on his job. He seemed like such a hard working man and a real family man. He was very good with his kids and real close with them. His children really thought a lot of him, and his older boys worked with him on the job.

I never saw Tim drunk nor did I ever hear about any kind of excessive drinking or drug use problems.

Tim just always seemed to be struggling to make enough money so that he would have enough for what his family needed. It

seemed like he was working all the time, seven days a week, and he couldn't hardly ever get off.

I couldn't believe that Tim was convicted of murder because he just wasn't the kind of man who would ever hurt anybody.

After Tim and Rita left West Monroe, we stayed in touch with them, and I always felt the same way about Tim that I did when he was in West Monroe.

I was never contacted by the trial attorney for Tim Baldwin either before or during the trial. I was never asked to testify on Tim's behalf. I would have been willing to testify as a character witness for Tim Baldwin or at the penalty phase of the trial, but I was never asked by anyone to do so.

Sandy Whatley
SANDY WHATLEY, AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME THIS 12 day of May, 1982.

Rebecca E Bennett
NOTARY PUBLIC

My commission expires:
9/15/89

EXHIBIT 6

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF GERALD NEIGHBORS

My name is Gerald Neighbors and I am the owner of the Iron House Corral, 1211 South Second Street, West Monroe, Louisiana.

I was an across the street neighbor of Tim Baldwin's in West Monroe for a number of months, and possibly a year, in the mid 1970's. We lived across the street from each other until, I believe, several months before the murder.

Tim and I were not close friends, but we would socialize once in awhile and we went hunting once or twice. We frequently talked to each other around our houses and my impression of him was that he was an extremely hard worker who left home early and got home late. He was seldom home before 8:00 p.m. or 8:30 p.m. and seemed to work six or seven days a week for an aluminum siding company.

Tim impressed me as a devoted family man who got one of his children pretty high up in the military and has one child in dental hygiene training at college.

Tim seemed like a hard worker and a regular person with no real bad habits. He was always peaceable and friendly. I never saw him drunk or disorderly.

I was really shocked when I learned that he had been arrested for murder, because that seemed so unlike Tim.

I was never contacted by Tim Baldwin's trial attorneys at any time before or after his trial about testifying on his behalf. I definitely would have been willing to testify as a character witness at his trial.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of May, 1982.

Gerald Neighbors
GERALD NEIGHBORS / AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 7th day of May, 1982.

Donna Gaston
NOTARY PUBLIC

EXHIBIT 7

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF ED REIS

I, Ed Reis, hereby swear under pain and penalty of perjury:

My name is Ed Reis, and I presently live in Ruston, Louisiana. My wife is Karri Reis.

My family and the Baldwins were neighbors in Choudrant for about two years in 1975 and 1976. Our families were friendly, and Tim and I were pretty close. Tim was a real nice fellow and a good neighbor. He always seemed to be quite good natured.

Tim was a hard worker. He was usually gone all day and part of the night -- he put in a bunch of long days. Even when he was home, Tim seemed to be busy all the time, working in the garden and trying to keep two or three cars running. Tim was always working; there was no sitting around for him. He always seemed like he was trying hard to get ahead. [redacted] E.R.

Whenever we needed help, Tim would be there to help us with whatever needed to be done.

As far as I knew, Tim had no drinking problems. His drinking was virtually none at all.

Tim always seemed pretty even-tempered. He would get aggravated with the kids every now and then, but he never would get violent or vicious. I can't conceive that Tim could have ever killed anyone.

I was never contacted by Tim's attorneys and I would have been willing to testify as a character witness at the penalty phase of the trial. but I was never asked by anyone to do so.

Ed Reis
ED REIS, AFFIANT

SWORN AND SUBSCRIBED TO BEFORE ME THIS 12 day of May, 1982.

J. Michael Clegg
NOTARY PUBLIC

My Commission Expires:

at death

EXHIBIT 8

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF KERRY REIS

I, Kerry Reis, hereby swear under pain and penalty of perjury:

My name is Kerry Reis, and I presently live in Ruston, Louisiana. I am the wife of Ed Reis.

My family and the Baldwins were neighbors in Choudrant. They lived behind us in a trailer, and we saw each other every day.

The Baldwins were good neighbors, and we thought a lot of Tim. Tim was a hard worker, up early and gone. He frequently didn't come home until late at night, working overtime when he could to make some extra money for the kids. Even when he was home Tim was constantly doing something -- he was not one to sit around. He added on rooms to their trailer and was always outside working when he was home.

Ed and I respected Tim and thought a lot of Rita and the kids. If we needed anything and Tim could help, he always would.

Tim was a quiet man, who I never heard raise his voice. I never even saw him spank the kids. We saw each other constantly, and he just seemed like a completely nonviolent person.

We were shocked when we heard the news about Tim's arrest and still can't believe that he was capable of doing such a thing.

I just never saw anything in Tim that would suggest he was capable of that sort of thing.

I was never contacted by Tim's trial attorneys. I would have been willing to testify as a character witness on Tim's behalf and at a sentencing hearing, but I was never asked by anyone to do so.

Kerry Reis
KERRY REIS AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME this 12 day of May, 1982.

J. Mikel Day
NOTARY PUBLIC

My Commission Expires:
At Death

EXHIBIT 9

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF RANDY VOLS

My name is Randy Vols, and I presently live at 3720 Canary Drive in Irving, Texas.

I knew Tim Baldwin for about 6-8 months when he worked in Shreveport, Louisiana, in 1976. At this time, Tim commuted from Monroe to Shreveport, and he later moved to Bossier City.

We worked for the same company and were crew chiefs on two separate crews. We also worked together on several jobs and saw each other at work quite a lot. Tim was always a hard worker and was always willing to work long hours.

After Tim and his family moved to Bossier City, we got to know the Baldwins very well and spent a lot of time at each other's houses. Tim impressed me as a good family man.

Tim did not drink [redacted] when I first met him, but his drinking increased as he started having financial problems. He never got violent or malicious when he was drinking like a lot of other people. Instead drinking made him melancholy and relaxed. I think he drank to relieve the financial pressure on himself.

I cannot believe that Tim could commit a murder. I never saw him violent at work or at any other time. He really never got mad, but was easy-going and a real good man.

I knew William Odell Jones who was living with Tim and his family. Jones always seemed a little strange. He stayed to himself and was a real loner.

I was never contacted by anyone on Tim's behalf or asked to testify at his trial. I would have been willing to testify as a character witness or at the sentencing phase of his trial.

I swear under the pain and penalty of perjury that the foregoing is true and correct.

HARRY VOLS, AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME this 12th day of May, 1982.

NOTARY PUBLIC

My Commission Expires:

GENE GLAZER, Notary
Commission Expires: 1-15-84

EXHIBIT 10

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF JIMMY TERRY

My name is Jimmy Terry. I am an insurance agent for State Farm Insurance at 601 N. Fourth Street, Monroe, Louisiana.

I knew Tim Baldwin when he was putting siding on my house in 1974. Tim worked on my house as a crew chief for about three to four weeks.

My impressions of Tim were very favorable. He was a very hard worker who would start work at 7:00 a.m. and stay on the job until dark. He was often back on Saturdays to work on the house. Tim did quite a job on my house and I was favorably impressed with him. You really couldn't ask for a better worker.

Tim was very cooperative and courteous. He never used bad language. Tim seemed to go out of his way to do favors and extra work on the job.

Often, Tim's children would work with him, and I was always impressed with how hard and how well the whole family worked together. When windows needed washing, for instance, Tim would tell me, without hesitation, that his son would do the job. His

son would then come and do the work right away. It appeared to me that the Baldwins were a hard working family.

My wife and I were astounded when we heard the news of Tim's arrest and conviction for murder. We just couldn't believe that a man as polite and courteous as Tim could ever do anything so horrible.

I was never contacted by Tim Baldwin's trial attorneys before or during his trial. I was never asked to testify at his trial. I would have been willing to testify on Tim's behalf if I had been contacted.

I declare under the pain and penalty of perjury that the foregoing is true and correct.

Executed on this 7 day of May, 1982.

JIMMY TERRY, AFFIANT

SWORN AND SUBSCRIBED TO BEFORE ME this 7 day of May, 1982.

NOTARY PUBLIC

EXHIBIT 11.

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF W. C. BARRETT

My name is W. C. "Bubba" Barrett. I presently live on Route 1 in Choudrant, Louisiana.

I lived across the street in Choudrant from Tim Baldwin and his family for about one year in the mid 1970's. Tim and I became friends at this time, [redacted]

It seemed to me that Tim worked all the time. He left home early and came home late and then worked around the house.

Tim was always a mighty nice fellow who worked hard and did his best to make a living for his family.

I never knew Tim to get drunk or even to drink excessively. He never had any problems with anyone that I saw. He always seemed peaceable and a good family man.

I was completely amazed when I heard that Tim had been arrested and convicted of murder, because it just seemed to me that Tim would not hurt anybody.

I was never contacted by the trial attorneys for Tim Baldwin either before or after the trial. I was not asked to testify on Tim's behalf at his trial. I would have been willing to testify

as a character witness for Tim Baldwin or at the penalty phase of his trial.

I declare under the penalty of prejury that the foregoing is true and correct.

Executed on this 12 day of May, 1982.

W. C. BARRETT, AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this 12 day of May, 1982.

NOTARY PUBLIC

EXHIBIT 12

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF PAT TENORIO

I, Pat Tenorio, hereby swear under pain and penalty of perjury:

My name is Pat Tenorio, and I reside at 1877 East 42nd Street, ~~Lorain~~ (LORAIN) P.T., Ohio.

Tim Baldwin and I are first cousins. We were very close when we were young. Tim was always like a big brother to me and used to watch after me.

I always felt that Tim wouldn't hurt a fly. He was such a caring person and was completely non-violent. Tim was a gentle boy and young man who would never do things to hurt people. I never saw him fight or argue with anyone. Even though he was as big or bigger than most of the boys his age, Tim would walk away when he was taunted or called names or when they wanted to fight him.

Tim's father died when he was a young boy, and Tim was always helping his mother and other people. He was even an altar boy at [redacted] (St Mary Magdalen Church [illegible] Lakewood, Ohio) — P.T. Catholic Church.

It is unbelievable to me based on my experience and knowledge of Tim that he would ever physically hury anybody, let alone commit a murder. I think it is especially unbelievable that he would hurt Mrs. Peters, the godmother of his child and a person he attended church with.

I was never contacted by the trial attorneys for Tim Baldwin either before or after the trial. I was not asked or ever consulted about testifying on Tim's behalf at his trial. I would have been willing to testify as a character witness for Tim Baldwin or at the penalty phase of his trial.

SWORN TO AND SUBSCRIBED BEFORE ME this 12 day of May, 1982.

PAT TENORIO, AFFIANT

NOTARY PUBLIC

My Commission Expires:

State of Ohio & Lorain County
My commission expires Nov. 27, 1982

WILLIAM GABRIEL, Notary Public
State of Ohio & Lorain County
My commission expires Nov. 27, 1982

EXHIBIT 13

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF RODNEY EAKER

I, Rodney Eaker, hereby swear under pain and penalty of perjury.

My name is Rodney Eaker and am presently incarcerated in Camp C at Louisiana State Penitentiary, Angola.

In 1978, I was represented by J. Randolph Smith and his law partner on charges in Ouachita Parish. During the month of June 1978 they were involved heavily with my trial. They both were completely tied up and devoted their complete efforts to defending me. J. Randolph Smith more than once told me they were having to set aside their law practice clients to work day and night on my case. Some time during my trial I noticed fatigue and strain having an effect on my attorneys due to the amount of work they were doing on my case. Randolph Smith was also doing investigation work for me, fighting to defend me.

During a conversation I had with Mr. Smith just before Tim Baldwin's trial, Mr. Smith told me he was simply not as prepared as he should be to handle Tim Baldwin's trial, due to the vast amount of work he had to do on mine. Tim's trial was immediately

after mine. Smith asked me not to mention his statement to Baldwin at the time the statement was made because the man was already under the strain of a capital offense charge and it would serve no purpose to upset Baldwin any more. Mr. Smith made the comment to me that my case was also a cash basis and Tim's was a public defender assisted case. [redacted]. I remember also Mr. Smith telling me "Rodney, I've tried to give your money's worth to you" and I thanked him for his effort and agreed with him. He expressed sorrow at not being as well prepared for the next trial, which was Baldwin's.

I have kept silent on the issue in order not to upset Baldwin even after he was sentenced, thinking the conversation I had with Smith would possibly shake Baldwin's confidence. I will submit to a polygraph test or PSE test if necessary to further enhance my statement and credibility.

Rodney Eaker
RODNEY EAKER, AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME this 13th day of May, 1982.

Merrit Thomas Jr.
NOTARY PUBLIC

My Commission Expires:

_____

EXHIBIT 14

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF TIMOTHY GEORGE BALDWIN

I, Timothy George Baldwin, hereby swear under pain and penalty of perjury:

My name is Timothy George Baldwin, and I am the petitioner in this action. I am presently incarcerated on death row at the Louisiana State Penitentiary, Angola, Louisiana.

My trial attorney, J. Randolph Smith, never asked me for the names of any character witnesses or of any other people who could testify on my behalf at the sentencing part of my trial. Mr. Smith told me on more than one occasion that character witnesses in my case would be of no help at sentencing. I did ask Mr. Smith to contact my parole officer, Ron Ryan, but I never was told what came of it.

Timothy George Baldwin
TIMOTHY GEORGE BALDWIN

SWORN TO AND SUBSCRIBED BEFORE ME on this 13th day of May, 1982.

NOTARY PUBLIC

My Commission Expires:

EXHIBIT 15

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, JR., ATTORNEY
GENERAL OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF RITA BALDWIN

I, Rita Baldwin, hereby swear under pain and penalty of perjury:

My name is Rita Baldwin, and I presently live at 429 East Vermillion, Apartment #3, Lafayette, Louisiana. I am the wife of Tim Baldwin.

Prior to Tim's trial in Monroe for murder, I tried to get in touch with his attorney, Randy Smith, many times. I remember finally being able to talk with him about a week before the trial. He told me I was possibly going to testify and asked me for some background information on Tim.

I do not recall that the subject of character witnesses ever came up in any conversation with Randy Smith until during the trial or after Tim's conviction. I was surprised and caught short when Randy then told me at that time it was imperative for me to come up with anybody that could say a good work about Tim. I was confused about what to do and made a few calls, but I really didn't know what Randy wanted because he was so vague about it.

I couldn't get anyone to testify that quickly. To my knowledge, Randy Smith did not make any efforts on his own to contact character witnesses, and he never asked me for the names of people to contact.

Rita Baldwin
RITA BALDWIN, AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME this 12 day of May, 1982.

NOTARY PUBLIC

My Commission Expires:

n/a

EXHIBIT 16

TIMOTHY GEORGE BALDWIN,

PETITIONER,

VERSUS

ROSS MAGGIO, WARDEN,
LOUISIANA STATE PENITENTIARY, AND
WILLIAM J. GUSTE, ATTORNEY GENERAL
OF THE STATE OF LOUISIANA,

RESPONDENTS.

AFFIDAVIT OF MICHELLE BALDWIN

My name is Michelle Baldwin and I live at 1404 North Seventh Street, Apartment No. 1, in Monroe, Louisiana. I am the step-daughter of Tim Baldwin.

I had a hard time getting in touch with Randy Smith before my step-father's trial. I did get in touch with him about one week before the trial, and he asked me some general background questions about my step-father. The whole conversation came up and was done in a very superficial way. He really didn't ask me very much, nor did he seem real interested in my answers or in pursuing the discussion. Randy did talk with me about my testimony during the trial on guilt or innocence. Nothing about my testimony at a sentencing hearing was discussed with me prior to the trial.

Randy told me after the guilt verdict that he wanted me to testify at the sentencing hearing. I was not prepared at all for what he would ask me. He just told me to answer his questions. I testified without any idea of what he would question me about.

Randy Smith never asked me about making contact with anyone else or about trying to get anyone else to testify as a character witness for my step-father.

I swear under the pain and penalty of perjury that the foregoing is true and correct.

MICHELLE BALDWIN, AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME THIS 12 day of May, 1982

NOTARY PUBLIC

My Commission Expires:

At Death

83-5432

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

TIMOTHY GEORGE BALDWIN,

Petitioner,

v.

ROSS MAGGIO, Warden
Louisiana State Penitentiary,
Angola,

and

WILLIAM J. GUSTE, JR.,
Attorney General of the
State of Louisiana,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Timothy George Baldwin, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Louisiana State Penitentiary in Angola, Louisiana. Mr. Baldwin's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

HELEN GINGER ROBERTS
GRAVEL, ROBERTSON & BRADY
POST OFFICE BOX 1792
ALEXANDRIA, LOUISIANA 71309
(318) 487-4501

COUNSEL OF RECORD FOR PETITIONER

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

TIMOTHY GEORGE BALDWIN,	:	
Petitioner,	:	No.
v.	:	
ROSS MAGGIO, Warden Louisiana State Penitentiary, Angola,	:	AFFIDAVIT
and	:	
WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana,	:	
Respondents.	:	

HELEN GINGER ROBERTS, being duly sworn, states:

1. I am an attorney for Timothy George Baldwin, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Baldwin's motion for leave to proceed in forma pauperis. My representation of Mr. Baldwin is without remuneration.

2. Mr. Baldwin is presently in the custody of the State of Louisiana and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Baldwin by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Baldwin is attached hereto.

3. Counsel was appointed to represent Mr. Baldwin at his trial and on appeal in the state courts. I have repre-

sented Mr. Baldwin in the instant habeas corpus proceeding in the district court and the court of appeals on a volunteer basis, without fee.

4. I am informed and believe that because of his poverty, Mr. Baldwin is unable to pay the costs of this cause or to give security to same.

5. I believe that Mr. Baldwin is entitled to redress in this action.

HELEN GINGER ROBERTS

Sworn to before me this
day of September, 1983

Notary Public

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

TIMOTHY GEORGE BALDWIN,	:	No.
Petitioner,	:	
v.	:	
ROSS MAGGIO, Warden Louisiana State Penitentiary, Angola,	:	AFFIDAVIT
and	:	
WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana,	:	
Respondents.	:	

I, Timothy George Baldwin, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf in the instant habeas corpus proceeding without remuneration. At trial and on appeal in the state courts, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Fourth Judicial District Court (Ouachita Parish), a trial court of the State of Louisiana, of first degree murder and was sentenced to death. My instant application for federal habeas corpus relief has been denied by the United States District Court for the Western District of Louisiana, and that denial has been affirmed by the United States Court of Appeals for the Fifth Circuit. I am being held at the Louisiana State Penitentiary in Angola, Louisiana. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

_____
Timothy George Baldwin

The foregoing affidavit of Timothy George Baldwin was subscribed and sworn to before me this ____ day of September, 1983.

_____
Notary Public

AFFIDAVIT OF SERVICE

Helen Ginger Roberts, being duly sworn, states:

I have served a copy of the foregoing MOTION TO PROCEED IN FORMA PAUPERIS upon the Honorable Johnny Parkerson, District Attorney of the Parish of Ouachita, by depositing a copy of same in the United States Mail, postage prepaid and properly addressed to Post Office Box 1652, Monroe, Louisiana 71201, on this ___ day of September, 1983.

HELEN GINGER ROBERTS

Sworn to before me
this day of September, 1983

Notary Public